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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

HANSEN BEVERAGE COMPANY, a Delaware corporation, Plaintiff, v. INNOVATION VENTURES, LLC dba LIVING ESSENTIALS, a Michigan corporation, Defendant.	CASE NO. 08-CV-1166 IEG (POR) **HANSEN BEVERAGE COMPANY'S NOTICE OF MOTION IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION** Date: September 15, 2008 Time: 10:30 a.m. Courtroom: 1 Hon. Irma E. Gonzalez

PLEASE TAKE NOTICE that on September 15, 2008, in the courtroom of the Honorable Irma E. Gonzalez located at 940 Front Street, Courtroom 1, San Diego, California, at 10:30 a.m., or as soon thereafter as the matter may be heard, Plaintiff Hansen Beverage Company ("Hansen") will move, and hereby does move, for an order preliminarily to enjoin Defendant Innovations, LLC dba Living Essentials from all activities that violate Section 1125 of the Lanham Act, including advertisements that use *5-hour ENERGY®*, 5-Hour Energy, or any other advertisement that claims "5 hours of energy."

This motion is based upon Hansen's notice of motion, Hansen's memorandum of points and authorities in support of its motion, the declarations of Rodney Sacks and Tom Davis, the exhibits lodged with this Court and the pleadings on file, and on such other evidence as may be presented at the time of the hearing.

DATED: August 8, 2008

SOLOMON WARD SEIDENWURM & SMITH, LLP

By: /s/ Edward J. McIntyre
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CERTIFICATE OF SERVICE

I caused the **HANSEN BEVERAGE COMPANY'S NOTICE OF MOTION IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION** to be served in the following manner:

Electronic Mail Notice List

Currently no defense counsel appear to be listed to receive e-mail notices for this case.

Mailing List

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

HANSEN BEVERAGE COMPANY, a Delaware corporation,

Plaintiff,

v.

INNOVATION VENTURES, LLC dba LIVING ESSENTIALS, a Michigan corporation,

Defendant.

CASE NO. 08-CV-1166 IEG (POR)

HANSEN BEVERAGE COMPANY'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR PRELIMINARY INJUNCTION

Date: September 15, 2008
Time: 10:30 a.m.
Courtroom: 1

Hon. Irma E. Gonzalez

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I
INTRODUCTION

Living Essentials advertises and sells ***5-hour ENERGY***,® a 2 oz. "energy shot" that it claims delivers **five hours** of energy in mere minutes. Living Essentials' advertising claims, however, are literally false—*5-hour ENERGY*® does not provide **five hours** of energy, as Living Essentials itself admits; indeed it provides **no** physical energy, which Living Essentials also admits.[1] To make matters worse, Living Essentials directly, and falsely, disparages Hansen's competing energy drinks.

Living Essentials' $40 million advertising campaign has worked; it has sold more than 125 million bottles of product, resulting in more than $100 million in *5-hour ENERGY*® sales.[2] As a result of Living Essentials' false advertising, however, Hansen has suffered and continues to suffer irreparable harm. As a consequence, Hansen is entitled to injunctive relief.

II
FACTUAL BACKGROUND

Hansen.

Since 1992, Hansen has developed, marketed, sold, and distributed a variety of product lines in the specialty beverage category—sodas, fruit juices, smoothies, lemonades, iced teas and energy and sports drinks.

In 1997 Hansen introduced Hansen's® Energy Drinks. Then, in April 2002, Hansen released the first of its popular Monster Energy® drinks. The Monster Energy® drink line has since grown to include Lo-Carb Monster, Monster Khaos, Monster Assault, Monster M-80, Monster Heavy Metal, and Monster Mixxd energy drinks, which also use the Monster and

---

[1] The Court will observe that Living Essentials uses slightly different graphic styles for *5-hour ENERGY*®—with italics and without, with capital letters or lower case. Hansen will attempt to replicate these graphic styles as they appear in Living Essentials' advertising.

[2] Declaration of Scott Henderson, Innovation Ventures' president, in support of Innovation Ventures' motion for a preliminary injunction against N2G, another competitor. *Innovation Ventures, LLC v. N2G Distributing, Inc. et al.*, 08-cv-10983, United States

Monster Energy® trademarks and similar trade dresses.[3]

In 2004, Hansen introduced Lost® Energy™ Drinks and Rumba™. In 2005, Hansen brought out Joker Mad Energy™ drinks, a low-carb version of Lost® under the Perfect 10™ brand name as well as a new Lost® Five-O™ energy drink. In 2006 Hansen introduced Ace™ Energy drinks and Unbound Energy® drinks.

Hansen's energy drinks have been most successful; more than 100,000 retail stores across the United States—convenience stores, gas stations, supermarkets, club stores, drug stores, warehouse stores[4]—sell them. They are the favored energy drinks of millions.[5] The most current Nielsen survey, June 28, 2008, demonstrates that Hansen's Monster Energy® in the 16 oz can is now **the** market leader in the United States. Overall, Hansen enjoys a 28.3% market share.[6]

Direct Competition Between Hansen and Living Essentials.

The energy drink industry is highly competitive. Hansen competes not only with "traditional" energy drinks like Red Bull—sold in 8, 12 and 16 oz. cans—but also with companies like Living Essentials, which market their 2 oz. drinks as "energy shots".[7]

Living Essentials characterizes its *5-hour ENERGY®* "energy shot" as "different" from and "superior" to traditional energy drinks. It contrasts its "energy shots" with "canned" energy drinks and specifically with Hansen's canned energy drinks.[8] Living Essentials publicly claims that *5-hour ENERGY®* produces **five hours** of **energy**. Living Essentials' own advertisements—undisputed and indisputable facts—drive Hansen's motion.

District Court for the Eastern District of Michigan, Southern Division, and Henderson declaration, dated July 15, 2008, filed with USPTO.

3 Declaration of Rodney Sacks ("Sacks Decl.") ¶¶ 3, 4.

4 Sacks Decl. ¶ 7.

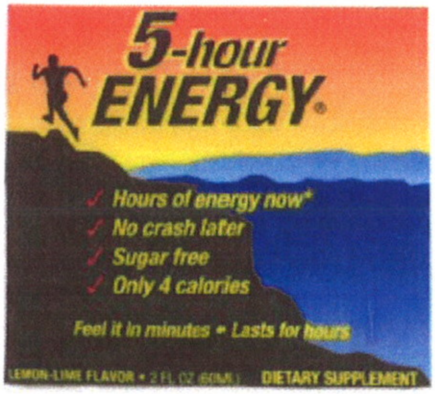
5 *Id.*

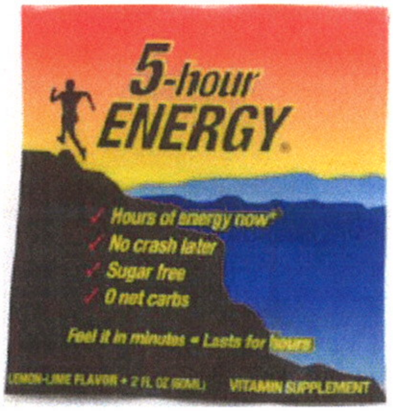
6 *Id.* at ¶ 8.

7 *Id.* at ¶¶ 9, 10.

8 One Living Essentials' advertisement, for example, leaves no doubt, by its identification of the "popular canned energy drink" and by its ingredient "contrast," that it is targeting Hansen's Monster Energy® drink. Sacks Decl. ¶ 16.

Living Essentials' Literally False Advertisements.


5-hour ENERGY
Hours of energy now*
No crash later
Sugar free
Only 4 calories
Feel it in minutes • Lasts for hours
DIETARY SUPPLEMENT


5-hour ENERGY
Hours of energy now*
No crash later
Sugar free
0 net carbs
Feel it in minutes • Lasts for hours
VITAMIN SUPPLEMENT

5-hour ENERGY® conspicuously proclaims on its drinks' label:

- "Hours of energy now"
- "No crash later"
- "Feel it in minutes • Lasts for hours"
- "Sugar free"
- "Only 4 calories"
- "0 net carbs"

Based on Living Essentials' own admissions, however, and based on its drinks' ingredients and fundamental science, *5-hour ENERGY*®'s claims—specifically the name itself, "5-Hour Energy;" and the boasts, "Hours of energy now;" "No crash later;" "Feel it in minutes • Lasts for hours;"—are literally false statements about *5-hour ENERGY*®.[9]

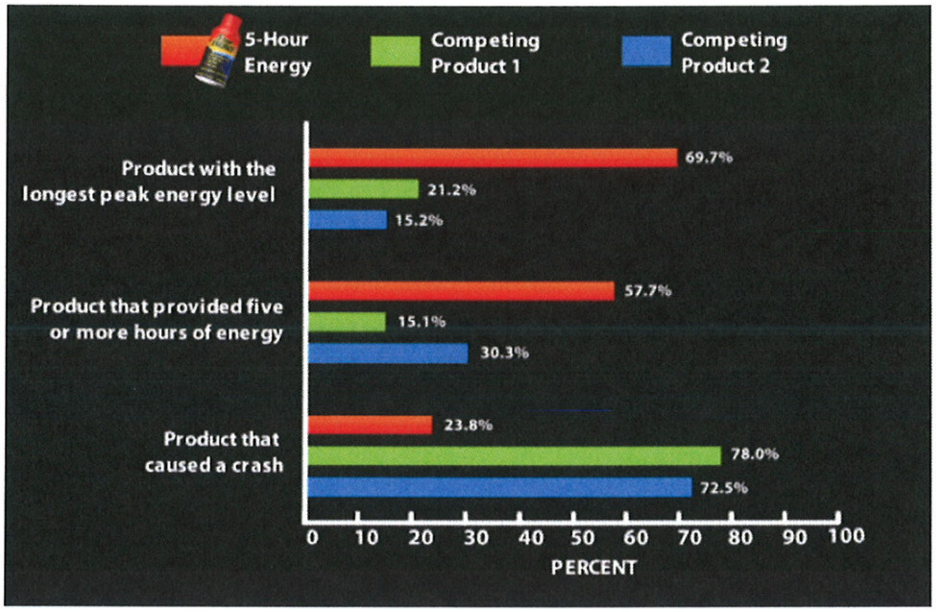
Because these claims are literally false—as science proves and as Living Essentials had to admit—Hansen seeks an order stopping them.

Living Essentials' Key Admissions: 5 Hours is Not 5 Hours; "No Crash" is Really a Crash.

Living Essentials buries a chart on its web site that puts the lie both to its "five hours of energy" claim as well as its "no crash" assertion.[10]

[9] Declaration of Dr. Thomas P. Davis, Ph.D. ("Davis Decl.") ¶ 4. Hansen submits the first four pages of Dr. Davis' extensive curriculum vitae and his declaration in support of this motion.

[10] (visited August 8, 2008) <http://www.5hourenergy.com/crasheffect.asp>


5-Hour Energy
Competing Product 1
Competing Product 2
Product with the longest peak energy level
69.7%
21.2%
15.2%
Product that provided five or more hours of energy
57.7%
15.1%
30.3%
Product that caused a crash
23.8%
78.0%
72.5%
0 10 20 30 40 50 60 70 80 90 100
PERCENT

As Living Essentials' own graphic demonstrates, barely half (only 57.7%) of those involved in what Living Essentials characterizes as a "clinical trial"—Hansen disputes both its methodology and results—claimed they experienced "**5 hours** of energy." Obviously aware that 43% of the trial's participants did **not** experience five hours of "energy," Living Essentials nonetheless unabashedly still calls its product, "*5-hour ENERGY*®;" it claims again and again that it provides "**five hours** of energy." It is axiomatic that "**five hours** of energy" does not mean "**only 57%** enjoy **five hours**."

Worse, Living Essentials claims that with *5-hour ENERGY*® there is "**No crash** later." Yet again, its own "clinical trial"—the methodology and results of which Hansen disputes—demonstrates that almost a quarter of the participants experienced that "crash." **Zero crash** does not mean **almost 25%** do experience a "crash."

These admissions, given the way Living Essentials persistently touts "**five hours**," demonstrate the literal falsity of its advertising. But, for Living Essentials, it only gets worse.

Living Essentials' Next Admission: *5-hour ENERGY*® Provides No Energy.

In spite of the name *5-hour ENERGY*®, and labels touting "energy" on each product and in spite of its $40 million advertising blitz, Living Essentials admits that *5-hour ENERGY*®" provides **no** energy.

When confronted with the obvious discrepancies between its disclosed ingredients and generally accepted principles of physics, biochemistry, pharmacology and physiology, Living Essentials has to acknowledge the truth. Buried in one of the links on its web site, Living Essential admits:

> If 5-Hour Energy contains **zero** net carbohydrates, from where does it derive its **energy**?
>
> 5-Hour Energy works to provide **mental alertness**, **focus** and **improved mood** ***rather than physical energy***... [Emphasis added.]

This admission—that *5-hour ENERGY®* delivers **no** physical energy—and basic science demonstrate that Living Essentials' claims about *5-hour ENERGY®*, including "**5-hour**" in the name itself, are literally false.

Worse, Living Essentials' claim that its energy shot produces energy that lasts for **five** hours—even though its own necessarily disputed "clinical trial" demonstrates it does not—only compounds the deception and further underscores that its claims are literally false.[11]

"Energy" is, and has been for years, a scientific term, defined in all physics and biochemistry textbooks and even in online resources such as Wikipedia.[12] One such standard definition states: "Energy" is often defined as the ability to do work... . Energy is often stored by cells in the form of substances such as carbohydrate molecules (including sugars) and lipids, which release energy when reacted with oxygen."[13] Energy-yielding nutrients are carbohydrates, proteins, fats and alcohol.[14]

Thus, there is a direct relationship between calories and energy; humans need calories every day, even without exercise, just to exist.[15] "Mental energy" also requires calories. The brain uses only glucose as an energy source and will starve the rest of the body's glucose stores, if necessary, to supply itself. Brain neurons cannot fire without glucose and require calories in the form of glucose to function.[16]

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[11] See Living Essentials' own claimed "clinical trial" results and discussion at p. 4, *supra*.
[12] Davis Decl. ¶ 7.
[13] *Id.*
[14] *Id.* at ¶¶ 12, 14.
[15] *Id.* at ¶ 9.
[16] *Id.* at ¶ 11.

Living Essentials' advertisements, including its much-prized logo: a man racing—bounding—up a steep hill, perhaps even a mountain, represent in the context in which Living Essentials presents them that *5-hour ENERGY®* not only delivers physical energy but **five hours** of it.[17] One does not charge up a mountain with just "mental alertness," "focus" or "improved mood" rather than "**physical** energy." One does not engage in all the activities Living Essentials' commercials tout—tennis; swimming; pull-ups; bounding down an office hallway; performing surgery; tossing a small child into the air; working as a mechanic; conducting a meeting—especially for **five hours** without physical energy.[18]

As Dr. Davis testifies, and as high school biology students have known for decades, human energy requires calories.[19] Not only, however, does Living Essentials claim that its *5-hour ENERGY®* drinks deliver energy, but that the energy produced lasts for **five** hours—even as the product's own name proclaims. The compounding effect of Living Essentials' admissions only underscore the literal falsity of its product name, its labeling and its other advertisements. That claim, not only as touted on the label, but as proclaimed in Living Essentials' other advertisements, is literally false and, for that reason, should be enjoined.

The "5-Hour Energy" Name.

When Living Essentials sued a competitor, N2G, in Michigan for trademark/ trade dress infringement, the district court recited the USPTO's finding when it denied Living Essentials' trademark application for "5-Hour Energy":

> Registration is refused because the proposed mark merely describes a characteristic of applicant's goods. ... In this case, applicant's proposed mark **merely describes a product that provides energy to the user for up to 5 hours** and therefore the proposed mark **describes a specific characteristic of the goods.**[20]

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[17] Living Essentials' inclusion of a man racing up a mountain is not incidental. In its trade dress lawsuit against N2G, Living Essentials asserted that this figure is an integral part of its trade dress and helps establish secondary meaning. It convinced that district court, which granted it a preliminary injunction. *Innovative Ventures, LLC v. N2G Distributing, Inc.*, 2008 U.S. Dist. LEXIS 30047, *15 (E.D. Mich. April 14, 2008).

[18] These commercials are on the disc that Hansen lodged with the Court.

[19] Davis Decl. ¶ 9.

[20] *Id. Innovative Ventures, supra* at * 3. When the USPTO rejected registration on the principal register, Living Essentials opted for supplemental registration.

The district court rejected Living Essentials' trademark claim for the same reason:

> Given the fact that "5 Hour Energy is **highly descriptive**, the Court finds that Plaintiff has not carried its "heavy burden," at this point in the case, to demonstrate that the primary significance of "5 Hour Energy" is to "identify the source of the product rather than the product itself."

Thus, in two actions that Living Essentials itself initiated—attempted trademark registration and a trademark lawsuit against a competitor—it ended up with findings that "5-Hour Energy" describes a product that Living Essentials claims "provides energy to the user for up to 5 hours."

What happens when that very name, "5-Hour Energy" is false or deceptive? The courts do not hesitate to strip it away and forbid its use.[21]

Living Essentials' Other Advertisements.

Living Essentials does not limit its literally false statements to the claims on its packages. One commercial states:

> Why do **energy drinks** make you **crash**? One minute you're wired up. The next you feel worse than before. The answer is large amounts of sugar and caffeine. But **with 5-Hour Energy you could sail through your day** with **no** jitters or **crash.** It **contains B Vitamins for energy** and amino acids for focus, zero sugar and only 8 calories. Drink it in seconds and in minutes you're feeling alert and productive **and that feeling lasts for hours. 5-Hour Energy. Hours of energy now. No crash later.** Available at these fine stores.[22]

As Dr. Davis testifies, Living Essentials' claims are literally false based not only on its own admission but also on established principles of physics, biochemistry, pharmacology and physiology and *5-hour ENERGY*®'s disclosed ingredients. At least the following claims are demonstrably false:

- "5-Hour Energy. Hours of energy now;"
- "with *5-hour ENERGY*® you could sail through your day with no jitters or crash;"
- "contains B Vitamins for energy;"
- "drink it in seconds and in minutes you're feeling alert and productive and that

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21 See discussion at pp. 17-18, below.
22 Sacks Decl. ¶ 21.

feeling lasts for hours;"

- "Hours of energy now. No crash later;"
- "you'll feel alert and focused for hours without the crash or jitters."[23]

Another Living Essentials' advertisement claims:

> This is you after an energy drink. Unfortunately, so is this. Why do **energy drinks** make you **crash**? One minute you're wired up. The next you feel worse than before. The answer is large amounts of sugar and caffeine. That's why you should try **a new liquid energy shot called 5 Hour Energy. With 5 Hour Energy, you can leave grogginess behind and sail through your day without feeling jittery, tense** or, you know. That's because **5 Hour Energy contains a powerful blend of B Vitamins for energy** and amino acids for focus, alertness and better mood. There is zero sugar, about as much caffeine as a cup of coffee and only 4 calories. The **2-ounce shot takes just seconds to drink and in minutes you're feeling bright, awake and productive and that feeling lasts for hours.** So **if your energy drink makes you crash, switch to 5 Hour Energy. Hours of energy now, no crash later.** Find out if 5 Hour Energy is right for you. It's available at these fine stores, or for more information go to 5hourenergy.com.

Dr. Davis concludes, for the same reasons, that at least the following claims are literally false:

- "Hours of energy now, no crash later;"
- "a new liquid energy shot called 5 Hour Energy;"
- "with *5-hour ENERGY*® you can leave grogginess behind and sail through your day without feeling jittery and tense or;"
- "in minutes you're feeling alert and productive and that feeling lasts for hours;"
- "*5-hour ENERGY*® contains a powerful blend of B Vitamins for energy;"
- "if your energy drink makes you crash, switch to 5 Hour Energy."[24]

Another *5-hour ENERGY*® commercial claims:

> Why are energy drinks bad? 12 spoons of sugar, that's bad. 200 calories, bad. Guarana, tisk, tisk. Good for a short jittery burst, then a debilitating crash. So don't drink energy drinks, drink **5-Hour Energy**. It's not a drink, more like a sip. Well **with that sip you'll feel alert and focused for hours,** without the crash or jitters. It has zero sugar, only 4 calories and no guarana. **5-Hour Energy. Hours of energy now. No crash later.**

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[23] Davis Decl. ¶¶ 16, 18, 20.
[24] *Id.* at ¶¶ 18-21.

Dr. Davis testifies that these Living Essentials' claims—specifically "5-Hour Energy. Hours of energy now"; "No crash later"; "with that sip you'll feel alert and focused for hours"— are also literally false.[25] *5-hour ENERGY*®, based on the ingredients disclosed on its package, cannot and does not produce the effects claimed.[26]

Similar claims made on the bottles of other *5-hour ENERGY*® products including *decaf 5-hour ENERGY*® are equally false.[27] Dr. Davis concludes that the ingredients of *decaf 5-hour Energy*®, at least as disclosed—"sugar free," "Decaf," "6 mg. of caffeine," "only 4 calories"—given generally accepted science, do not and cannot provide "Hours of energy now," "Feel it in minutes • Lasts for hours," "No crash later."[28] Such claims are literally false based on Living Essentials' admission and on the product's disclosed ingredients including, in particular, the limited amount of caffeine and sugar in the product.[29]

Living Essentials Targets Hansen and Its Products.

The *5-hour ENERGY*® commercial we examined immediately above proclaims:

> **Why are energy drinks bad? 12 spoons of sugar, that's bad. 200 calories, bad. Guarana, tisk, tisk. Good for a short jittery burst, then a debilitating crash. So don't drink energy drinks**, drink 5-Hour Energy. It's not a drink, more like a sip. Well with that sip you'll feel alert and focused for hours, without the crash or jitters. It has zero sugar, only 4 calories and **no guarana.** 5-Hour Energy. **Hours of energy now.** No **crash** later.

Living Essentials' statements about energy drinks highlighted above—"12 spoons of sugar, that's bad. 200 calories, bad. Guarana, tisk, tisk." or that *5-hour ENERGY*® "has zero sugar, only 4 calories and no guarana" or that energy drinks are "good for short jittery bursts, then a debilitating crash"—by clear, but false, reference both target and falsely disparage Hansen energy drinks and falsely impute adverse characteristics to them.[30]

Hansen's energy drinks contain the ingredients to which Living Essentials refers;

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[25] *Id.* at ¶¶ 16, 17.
[26] *Id.* at ¶ 20.
[27] *Id.* at ¶ 22.
[28] *Id.*
[29] *Id.*
[30] See further discussion at pp. 19-21, below.

specifically, Hansen's Monster Energy® is a major canned energy drink with guarana and sugar—a fact well known in the marketplace.[31]

Living Essentials' statements say, or at a minimum strongly suggest, that Hansen's energy drinks contain large amounts of sugar and caffeine and that, as a consequence, produce negative results that *5-hour ENERGY®* drinks do not—even though *5-hour ENERGY®* drinks contain even higher levels of caffeine than Hansen's energy drinks.[32] The statements are also literally false statements about *5-hour ENERGY®*, in light of Living Essentials' own admissions and based on the drink's ingredients and generally accepted scientific principles. These comparison attacks directly target Hansen's Monster Energy® drinks.[33]

Irreparable Injury.

Living Essentials' statements are literally false statements about its own products and also, by clear inference, about Hansen's. They are designed to, and most likely do, influence the purchasing decisions of a substantial number of reasonable consumers and actually deceive or tend to deceive a substantial segment of the reasonable consumer audience.[34]

Living Essentials admits that it spends more than $40 million on advertising through every media and that its advertising is very successful. It claims sales in excess of $100 million in only three years and of more than $22 million in January and February 2008 alone.[35]

Accordingly, it is a practical impossibility to "counter" Living Essentials' literally false statements about its own product and its disparagement of Hansen's.[36] Hansen filed this action and served Living Essentials on July 1; in spite of that, Living Essentials has persisted with the same advertisements and has made clear that it will continue to do so unless this

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31 Sacks Decl. ¶ 23. Guarana is a caffeine source.
32 *Id.* at ¶ 29.
33 *Id.* at ¶¶ 23, 29, 33.
34 *Id.* at ¶ 34.
35 Living Essentials' motion for a TRO and preliminary injunction, pp. 1 & 13. *Innovation Ventures, LLC v. N2G Distributing, Inc., supra.*
36 Sacks Decl. ¶ 33.

Court enjoins it.[37]

More importantly, money damages are clearly inadequate to compensate Hansen for the harm it will continue to suffer. Hansen cannot know or measure with precision sales lost from Hansen customers who purchase Living Essentials' products instead of Hansen's because of this advertising. Hansen also cannot know or accurately measure its lost sales as a result of potential customers whom Living Essentials diverted from Hansen because of the disparagement of Hansen.[38]

III
HANSEN IS ENTITLED TO INJUNCTIVE RELIEF

Legal Standard For Granting a Preliminary Injunction.

The Ninth Circuit standard is well-established. If the moving party shows **either** (1) a combination of probable success on the merits and the possibility of irreparable harm, **or** (2) the existence of serious questions going to the merits and the balance of hardships tipping in its favor,[39] it is entitled to relief. These are not separate tests but outer reaches of a single continuum.[40]

Hansen is entitled to a preliminary injunction because it has established the probability of success and the possibility of irreparable harm that it has and will continue to suffer.

Hansen Will Succeed On The Merits of its False Advertising Claim.

Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), establishes a federal cause of action for false advertising. The statute provides:

> (1) Any person who, on or in connection with any goods or services . . . uses in commerce any . . . false or misleading description of fact, or false or misleading representation of fact, which -
> (B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or

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[37] Sacks Decl. ¶ 34.
[38] *Id.*
[39] *Miss World (UK) Limited. v. Mrs. America Pageants, Inc.*, 856 F.2d 1445, 1448 (9th Cir. 1988).
[40] *Dollar Rent A Car, Inc. v. Travelers Indem. Co.*, 774 F.2d 1371, 1374-75 (9th Cir. 1985).

> commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

A plaintiff shows a likelihood of success on a Lanham Act false advertising claim by demonstrating that the advertisement is "literally" or facially false.[41] The test for literal falsity is quite simple: "If a defendant's claim is **untrue**, it must be deemed **literally false**."[42]

Where an advertisement is literally false, the court may enjoin its use without any extrinsic evidence of the advertisement's impact on the buying public.[43]

The Ninth Circuit has adopted the "false by necessary implication" doctrine.[44] Accordingly, a district court evaluating whether an advertisement is literally false must analyze the message **in full context**.[45] Thus, to determine facial falsity the court must view the statement in its entirety, rather than examining the eyes, nose, and mouth separately and in isolation from each other.[46] If the words or images, considered in context, **necessarily imply** a false message, the advertisement is literally false and no extrinsic evidence of consumer confusion is required.[47]

__**Living Essentials' Product Label Is Literally False.**__

Living Essential makes numerous claims on its *5-hour ENERGY®* labels:

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41 *See Johnson & Johnson-Merck Consumer Pharms. Co. v. SmithKline Beecham Corp.*, 960 F.2d 294, 297 (2d Cir. 1992).

42 *Castrol Inc. v. Pennzoil Co.*, 987 F.2d 939, 944 (3d Cir. 1993).

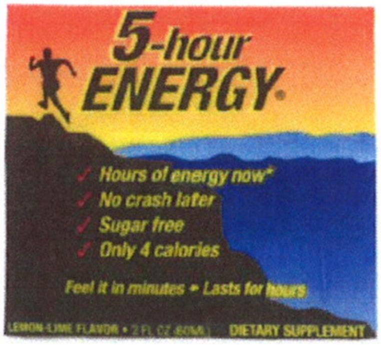
43 *Coca-Cola Co. v. Tropicana Prods., Inc.*, 690 F.2d 312, 317 (2d Cir. 1982); *In re Century 21etc. v. Re/Max South Country*, 882 F.Supp.915, 922 (C.D. Cal. 1994) ("In other words, if an advertisement is literally or explicitly false, the plaintiff need not prove any impact on the buying public."); *Taser International, Inc. v. Bestex Company, Inc., et al.*, 2007 U.S.Dist. LEXIS 80775 *20 (C.D. Cal. 2007).

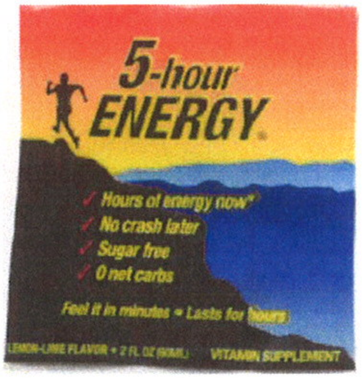
44 *See e.g. Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1139 (9th Cir. 1997); *Time Warner Cable, Inc. v. Directv*, Inc., 497 F.3d 144, 158 (2d Cir. 2007); *Scotts Co. v. United Indus. Corp.*, 315 F.3d 264, 274 (4th Cir. 2002); *Clorox Co. Puerto Rico v. Proctor & Gamble Commercial Co.*, 228 F.3d 24, 34-35 (1st Cir. 2000); *Castrol Inc. v. Pennzoil Co.*, 987 F.2d 939, 946-47 (3d Cir. 1993).

45 *Southland Sod Farms, supra* at 1139. See also discussion at pp. 14-15, below for FDA regulations that also require that dietary supplements' claims be judged in context.

46 *Southland Sod Farms, supra* at 1139.

47 *Id.*


5-hour
ENERGY
Hours of energy now*
No crash later
Sugar free
Only 4 calories
Feel it in minutes • Lasts for hours
DIETARY SUPPLEMENT


5-hour
ENERGY
Hours of energy now*
No crash later
Sugar free
0 net carbs
Feel it in minutes • Lasts for hours
VITAMIN SUPPLEMENT

The labels themselves, taken in context, claim that *5-hour ENERGY®* does several things: 1) it provides energy within minutes of consumption; 2) this energy will last **for hours**, in fact for **five** hours; and 3) this energy allows the consumer to perform physical activities, even race up a mountain, **for hours**. These claims are demonstrably and admittedly false.

In fact, the only claims that are not false—"sugar free," "0 net carbs" and "only 4 carbs"—underscore precisely why the critical claims are literally false. As a matter of science, energy comes from calories.[48] *5-hour ENERGY®* says it has only 4 calories (the same as in 2 Tic-Tac breath mints).[49] These anemic 4 calories do not, indeed cannot, provide **5 hours** of sustained energy, as the *5-hour ENERGY®* name itself claims, nor energy that "lasts for **hours**" as the label proclaims.[50]

<u>The Smoking Gun.</u>

Living Essentials itself admits that *5-hour ENERGY®* does **not** provide **energy**. The *5-hour ENERGY®* web site has a "FAQ's" link with nineteen questions and answers. Buried in the middle, the tenth question and answer admit:

> If 5-Hour Energy contains **zero** net carbohydrates, from where does it derive its **energy**?
>
> 5-Hour energy works to provide **mental alertness, focus** and **improved mood rather than physical energy**..."[51] [Emphasis added.]

In addition, Living Essentials' own "clinical trial" demonstrates that barely half of the participants report experiencing five hours of "energy"—whatever that "energy" means in the Living Essentials' context.[52]

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[48] Davis Decl. ¶ 5, 7, 8.
[49] (visited August 8, 2008) <http://www.calorieking.com>
[50] Davis Decl. ¶ 22.

Does Living Essentials' put its admission—that *5-hour ENERGY®* provides **no physical energy**—anywhere on its product label? Is it mentioned, suggested even, on any commercial? In print or internet advertising? Does it say on any advertisement that barely half the participants in its own trial experienced the claimed effect? Asking the questions answers them.

"[M]ental alertness, focus and improved mood" are not energy, and assuredly not **five hours** of energy. Energy is not a feeling; it is a measurable, physical fact.[53] One can attain the elusive feelings of "improved mood," "mental alertness" or "focus" from an aromatic candle, yoga or a five minute nap. Living Essentials' claims that *5-hour ENERGY®* provides "**hours of energy now**" or that the energy "**lasts for hours**" and especially "**five hours**" are literally false. One cannot bound up a mountain substituting "mental alertness," "focus" and "improved mood" for "physical energy," and certainly not **for hours** and especially not for **five hours.** "Mental energy" also requires calories in the form of glucose for the brain to function.[54]

The FDA: Energy and Calories.

5-Hour Energy admits on its label that it is a "dietary supplement." The FDA's regulations for nutrition labeling of dietary supplements state that the FDA considers calories and "energy" to be synonymous:

> The following synonyms may be added in parentheses immediately following the name of these (b)(2) dietary ingredients: Vitamin C (ascorbic acid), thiamin (vitamin B 1), riboflavin (vitamin B 2), foliate (folacin or folic acid) , and **calories** (**energy**).

The regulations further provide that:

> … [e]nergy content per serving may be expressed in kilojoule units, added in

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51 (visited August 8, 2008) <http://www.5hourenergy.com/QandA.asp>

52 We know from the same website, however, that it is not physical energy.

53 Davis Decl. ¶ 5.

54 *Id.* at ¶¶ 11, 12.

parentheses immediately following the statement of caloric content.[55]
FDA Requirements for Dietary Supplement Claims.

The FDA regulations mandate:

(1) *Health claim* means any claim made on the **label** or in labeling of a food, including a **dietary supplement**, that expressly **or by implication**, including "third party" references, written statements (e.g., a brand name including a term such as "heart"), **symbols** (e.g., a heart symbol), or **vignettes**, characterizes the relationship of any substance to a disease or health-related condition. **Implied** health claims include those **statements, symbols, vignettes**, or other forms of communication that suggest, **within the context in which they are presented**, that a relationship exists between the presence or level of a substance in the food and a disease or health-related condition.[56]

* * *

(3) *Nutritive value* means a value in sustaining human existence by such processes as promoting growth, replacing los of essential nutrients, or **providing energy**.

The same regulations mandate that any claim must be "**complete, truthful, and not misleading.**"[57] *A fortiori*, the maker of a dietary supplement cannot make claims on its label and in its public advertising and then bury caveats about those very claims on its websites—precisely as Living Essentials has done here. Living Essentials' very public claims about *5hour ENERGY®* are not "complete, truthful and not misleading" and its website's "explanations" do not save it.[58]

Under both FDA standards and Ninth Circuit decisional law, Living Essentials' claims are literally false and, as such, should be enjoined.

The Ninth Circuit: Standard for "Literally False."

Southland Sod Farms[59] provides a pointed analysis of what constitutes literal falsity and the importance of context in determining when an advertisement is a literal falsity. *Southland* involved competing turf grass seed and sod producers. Plaintiff claimed that

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55 21 CFR § 101.36(b)(2)(B)(2). [Emphasis added.] *See* Davis Decl. ¶ 8 for relationship between joules, kilojoules and Calories.

56 21 CFR § 101.14(a)(1) and (3) [Emphasis added.]

57 21 CFR § 101.14(d)(2)(iii). 21 U.S.C. §§ 331(a) and 343(a) require that dietary supplements be sold in accordance with the FDCA's labeling regulations including 21 CFR §§ 101.14 and 101.36.

58 See cases and discussion at pp. 17-18, below.

59 *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134 (9th Cir. 1997).

defendant's comparative advertising was false while asserting that its own Bonsai grass grew slower—a desirable characteristic that reduces mowing and maintenance costs.

One advertisement was a bar chart graphically comparing clipping weights of competitors' grass, including plaintiff's. Plaintiff claimed that the underlying tests were flawed because they were done in the first spring following a fall planting—when the defendant's product characteristically grew at a slower rate than competitors'. Notably, the charts did say that the data was accumulated over a limited time period in a particular location. Plaintiff showed that when an entire year's growth was used, its grass' growth was comparable to the defendant's.

The Ninth Circuit reversed the district court's finding that the advertisements were not literally false. "We find that the district's court's conclusion as to literal falsity to be erroneous because it failed to consider Defendant's bar-chart advertisements in their full context."[60]

By contrast, Living Essentials' claims are patently and literally false. In *Southland*, at least the bar chart mentioned that the results were based on data from a limited time period—still insufficient by Ninth Circuit standards. Here the name "**5-Hour** Energy," and the claims "**Hours of energy** now" and energy that "**lasts for hours**" are unsupported and unsupportable. Energy, whether physical or mental, results from burning calories; it can be measured. Energy is defined as "vigor in performance of an action,"[61] precisely what not only Living Essentials' *5-hour ENERGY®* name, packaging and advertising all claim but, worse, that the energy will last **for hours**.

The Lanham Act encompasses more than blatant falsehoods. It also embraces innuendo, indirect intimations, and ambiguous suggestions.[62] The *5-hour ENERGY®* label prominently shows the silhouette of a runner racing up a mountain. It not only screams physical energy, as does the *5-hour ENERGY®* name itself and the prominent claims: "**hours**

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[60] *Id.* at 1144.
[61] See, e.g., *Webster's II New College Dictionary,* 2001 Edition.
[62] *Southland Sod Farms, supra,* at 1140.

of energy now;" "lasts for **hours**," but critically it promises sustained energy that lasts **for hours**.

These are literally false claims. *5-hour ENERGY®*, based on its own ingredients and fundamental science, does not and cannot provide the "energy" that allows one to engage in sustained physical or mental activity—and especially **five hours** of claimed activity.

Consequences of Using a Deceptive Trademark or Trade Name.

Recently, the Ninth Circuit affirmed stripping a party's trade name because a dietary supplement violated FDA labeling regulations and was, as a consequence, deceptive. In *Creagri*,[63] the court upheld trademark priority for a competitor and cancellation of the mislabeled product's trademark registration.[64] The court's reasoning applies equally here:

> [T]he nexus between a misbranded product and that product's name, particularly one designed for human consumption, is sufficiently close to justify withholding trademark protection for that name until and unless the misbranding is cured.[65]

Living Essentials' label violates the same FDA regulations. Accordingly, it should be barred from using its "5-Hour Energy" name, precisely because any qualification or "correction" is, or would be, meaningless.

In *Resort Car Rental System*,[66] the Ninth Circuit upheld striking the trade name "Dollar-a-Day" as deceptive, rejecting the argument that the consumer learned the actual facts before entering into a contract. "The 'Dollar-A-Day' slogan carries strong psychological appeal. Its connotations are obvious. ... the public is not under any duty to make reasonable inquiry into the truth of advertising. ... Advertising capable of being interpreted in a misleading way should be considered against the advertiser."[67]

The court also rejected the argument that excision of the trade name "Dollar-A-Day"

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63 *Creagri, Inc v. USANA Health Sciences, Inc.*, 474 F.3d 626 (9th Cir. 2007).

64 The court held that "use in commerce" for trademark priority meant **lawful** use and lawful use meant compliant with "federal labeling requirements."

65 *Id.* at 631-32. Creari's trademarked product claimed first 25mg and then 5mg or hydroxytyrosol; the accurate amount was 3mg. That difference made it unlawful and supported cancellation of the trademark.

66 *Resort Car Rental System, Inc., et al. v. FTC*, 518 F. 2d 962 (9th Cir. 1975).

67 *Id.* at 964.

destroyed valuable good will, finding that the name **by its nature** has a decisive connotation for which any qualifying language would result in a contradiction in terms.[68] 5-Hour Energy has an equally "decisive connotation" such that any qualifying language on the container or elsewhere likewise results in contradiction.

The *Continental Wax*[69] court reached the same conclusion when it upheld striking the trade name "Six Month Floor Wax" as incurably deceptive.

> Where, as here, however, the offending deception is caused by a clear and unambiguous false representation implicit in the product's name and, because of this, the addition of a qualifying phrase denying the truth of that representation would lead to a confusing contradiction in terms, no remedy short of complete excision of the trade name will suffice.[70]

Viewing Living Essentials' labels, packaging and claims—including its man-racing-up-the-mountain symbol—in the context in which they are presented, as *Southland Sod Farms* and FDA regulations require, the name "5-Hour Energy" and the "five hours of energy" claims, at a minimum, are literally false. Living Essentials' admissions and basic science demonstrate the point.

As *Creagri* makes clear, the literal falsity here is all the more pernicious precisely because the mislabeling is in the product's name itself: *5-hour ENERGY*®. More to the point, as *Creagri*, *Resort Car Rental* and *Continental Wax*, among other cases, demonstrate "qualifying" statements, whether on the label or buried in a web site are ineffective precisely because "5 Hour Energy" has a decisive and unambiguous connotation. In the circumstances, "5-Hour Energy" should be enjoined.

Living Essential's Web Site and Television Commercials Are Also Literally False.

Several *5-hour ENERGY*® commercials are on the CD lodged with the Court; one also

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68 *Id.*

69 *Continental Wax Corporation v. FTC*, 330 F.2d 475 (2d Cir. 1964).

70 *Id.* at 479-80. See also *Elliot Knitwear, Inc. v. FTC*, 266 F.2d 787 (2d Cir. 1959) ("Cashmora" sweaters, with no cashmere, deceptive); *FTC v. Army and Navy Trading Co.*, 88 F.2d 776 (D.C. Cir. 1937) ("Army and Navy" deceptive where goods no longer purchased from Army or Navy).

plays on the *5-hour ENERGY®* web site.[71] These commercials are also literally false.

Each stresses **sustained** energy again and again; they show vignettes of presumed consumers of *5-Hour Energy®* running uphill, doing pull ups, swimming, lifting a toddler and throwing her in the air, playing tennis, managing a bakery, running a construction site, bowling—all physical activity; all requiring physical energy.

The "false by necessary implication" doctrine interprets that these "action scene" vignettes as designed to show the type and level of energy *5-hour ENERGY®* supposedly produces. Like the *5-hour ENERGY®* label, the commercials state that the product offers **hours of energy**. The combination of the words and images, considered in context, states a false message, making the commercials literally false.

Judging the claims, the symbols and the vignettes in these commercials in the context in which they are presented, the conclusion is unmistakable: the "**five hours** of energy" and "no crash" claims are literally false—including the repeated use of *5-hour ENERGY®*. As such, they should be enjoined.

Living Essentials' Commercials Attack Monster Energy® Drinks.

Living Essentials' commercials draw negative comparisons between *5-hour ENERGY®* and another energy drink, which by clear and necessary implication is Hansen's Monster Energy®. One commercial says that the other energy drink is "good for a short jittery burst" and then causes a sudden decrease in energy—Living Essentials calls it "crash" [the commercial shows an office employee slumped in her chair, and another passed out with his head on his desk]. Another commercial claims that the other energy drink makes one feel jittery and tense [the commercial shows a person nervously tapping his fingers on his desk]. These exaggerated images depicting negative side effects misrepresent Monster Energy®.

Visual exaggeration without saying that the exaggeration is atypical makes Living Essentials' commercials literally false. In *S.C. Johnson*[72] the district court concluded that an advertisement was "literally false in respect to its depiction of the flow of water out of the [Ziploc] bag" where an advertisement showed two upside-down resealable storage bags filled with water and some goldfish. The Glad bag did not leak; the Ziploc bag did—rapidly. The Second Circuit affirmed.[73]

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[71] Depictions on web sites constitute advertising for a Lanham Act claim. *Perfumebay.com Inc. v. Ebay Inc.*, 506 F.3d 1165 (9th Cir. 2007).

[72] *S.C. Johnson & Son, Inc. v. Clorox Co.*, 241 F.3d 232 (2d Cir. 2001).

So here. The commercials blame these alleged negative side effects on **sugar, caffeine** and **guarana**–all of which Hansen's Monster Energy® drinks contain – none of

ENERGY DRINK COMPARISON

Ingredients

Compare 5-Hour Energy with a popular canned energy drink. You'll see that 5-Hour Energy contains more of what you want and less of what you don't want in an energy drink.

	5-Hour Energy as of October 2007	Popular Canned Energy Drink
Serving Size	2oz	8oz
Calories	4	100
Sugar	0	27g
Carbohydrates	0	27g
Sodium	10mg	180mg
Niacin (Vitamin B3)	30mg	20mg
Vitamin B6	40mg	2mg
Vitamin B12	500mcg	6mcg
Energy Blend	1870mg	1250mg*

* Lists sugars as part of the energy blend. 5-Hour Energy contains zero sugar.

5-hour ENERGY
VS.
POPULAR CANNED ENERGY DRINK

which is harmful.[74] Living Essentials' own web site confirms that Hansen's Monster Energy® drinks is the intended target of the negative commercials. Living Essentials has a side-by-side comparison of *5-hour ENERGY®* and the other "popular canned energy drink."[75]

MΦNSTER
ENERGY

[73] *Id.* (quoting district court opinion)

[74] Sugar provides energy; guarana, a caffeine source, is not harmful and 5-Hour Energy itself contains caffeine. Sacks Decl. ¶ 29.

[75] (visited August 8, 2008) <http://www.5hourenergy.com/compare.asp.>

First, the picture of the "popular" competitor's can has a black background—the Monster Energy® can has a black background. **Second**, the writing on the "popular canned energy drink" can is fluorescent lime green—the signature color of the emblem on Monster Energy® drinks. **Third,** both the kind and amount of the ingredients for the "popular canned energy drink" match those on Monster Energy®.[76] **Finally**, the reference to a "***popular***" canned energy drink—with a black can and lime green writing—leaves no doubt in the energy-drink marketplace that Living Essentials' reference is Monster Energy.® Its 16 oz. can—precisely what Living Essentials targets—is now **the** market leader in the United States,[77] and is a major canned energy drink with guarana, caffeine and sugar.[78] The side-by-side comparison, along with the commercials both on television and on *5-hour ENERGY*®'s web site, leave no doubt that Living Essentials has targeted Monster Energy® and painted it with a negative brush. Such literally false comparisons allow the Court to presume irreparable injury.

Hansen Will Suffer Irreparable Injury Absent Preliminary Injunctive Relief.

Hansen has been and will continue to be injured as a result of Living Essentials' false claims—both in its commercials and on the *5-hour ENERGY*® bottle—that depict *5-hour ENERGY*® as superior to Hansen energy drinks, causing it to lose customers, market share and good will. For a preliminary injunction, Hansen need only show the **possibility** of injury, without regard to its magnitude.[79]

Irreparable harm is presumed where the advertisements at issue are literally false and draw a direct comparison to the plaintiff.[80] Irreparable harm is even presumed without direct comparison.[81]

Living Essential's strategy of not mentioning Hansen's Monster Energy® by name does not immunize Living Essentials nor does it eliminate Hansen's irreparable harm.

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[76] Living Essentials got the amount of the "Energy Blend" in Monster Energy® wrong; it listed half what is on the Monster Energy® label.
[77] Sacks Decl. ¶ 8.
[78] *Id.*, at ¶ 23.
[79] *Simula Inc. v. Autoliv, Inc.*, 175 F.3d 716, 725 (9th Cir. 1999).
[80] *Castrol Inc., supra,* at 62.
[81] *See Time Warner Cable, Inc., supra.*

In *Time Warner Cable, Inc.*,[82] Time Warner sued DIRECTV over DIRECTV's television commercials and internet advertisements that compared the resolution and quality of its high definition channels with Time Warner's. The commercials, however, never referred to Time Warner by name. Instead, they used the generic, "cable." In one commercial, William Shatner playing Captain Kirk, says "...settling for cable would be illogical."[83] In another, the narrator states "For an HD picture that can't be beat, get DIRECTV"[84]—in that commercial even the word "cable" was not used. The court found the commercials literally false and granted Time Warner a preliminary injunction.

On appeal, DIRECTV argued that Time Warner could not show irreparable harm because neither commercial mentioned Time Warner by name and one commercial did not even mention "cable." The Second Circuit, however, held that "although...the commercials never identified Time Warner by name, the presumption of irreparable harm applies with equal force in this case."[85] The Court explained:

> Thus, even though Shatner does not identify TWC by name, consumers in the markets covered by the preliminary injunction would undoubtedly understand his derogatory statement, "settling for cable would be illogical," as referring to TWC. Because the Revised Shatner Commercial "necessarily diminishes" TWC's value "in the minds of the consumer," the District Court properly accorded TWC a presumption of irreparable harm.[86]

Hansen has been and continues to be harmed by Living Essentials' false claims about *5-hour ENERGY®*, and by its attacks on Monster Energy®. Living Essentials attacks the ingredients found in Hansen's drinks, including caffeine, guarana and sugar—tagging them as "bad" and showing outright disapproval, "tisk, tisk." Monster Energy® drinks are a "popular canned energy" drink with guarana, sugar and caffeine. Living Essentials also accuses Hansen's products of causing consumers to "crash," and have "jitters." Neither

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82 *Time Warner Cable, supra*, at 158.
83 *Id.* at 150.
84 *Id.*
85 *Id.* at 162.
86 *Id.*

claim is true.

The combination of attacking a signature ingredient of Hansen's Monster Energy®, and the side-by-side comparison on its web site, is the equivalent of DIRECTV directly implicating Time Warner by using "cable" in its commercials.

Hansen, however, does not even have to show the link the *Time Warner* court found to enjoy the presumption of irreparable harm. In *McNeil-PPC v. Pfizer*,[87] Pfizer touted Listerine to be "as effective as floss." The court found this claim literally false, found that McNeil-PPC had been irreparably harmed, and issued a preliminary injunction. As in *Time Warner*, no commercial mentioned McNeil or its dental floss product by name; at best, some showed a white floss container similar to McNeil-PPC's.[88]

Unlike Time Warner, McNeil-PPC was **not** the only floss manufacturer in the industry; it was one of several, merely a "market leader" with an approximate 40% market share. That was sufficient under *Castrol* [89] for the court to presume irreparable injury as a matter of law.[90]

Here, we have literally false advertisements that tout the "benefits" of *5-hour ENERGY®* without specific, direct reference to Hansen's products. Even though there are other energy drinks in the market, because Hansen is a market leader (or as Living Essentials admits Monster Energy® is **the** "popular canned energy drink"), Hansen has demonstrated irreparable harm as a matter of law.

Hansen has been and continues to be irreparably harmed. It has lost sales to Living Essentials and has experienced a reduction in its goodwill.[91] "Because it is virtually impossible to prove that so much of one's sales will be lost or that one's goodwill will be damaged as a direct result of a competitor's advertisement, the plaintiff **need not point to an**

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87 *McNeil-PPC, Inc. v. Pfizer Inc.*, 351 F.Supp.2d 226 (S.D.N.Y. 2005).
88 *Id.* at 250.
89 *Castrol, Inc. v. Quaker State Corp.*, 977 F.2d 57, 62 (2d Cir. 1990) (misleading commercials that which tout the benefits of the product advertised but made no direct reference to any competitor's product).
90 *McNeil-PPC, supra*, at 250.

actual loss or diversion of sales to satisfy this requirement."[92]

Living Essentials knows the value of protecting goodwill in the fiercely competitive energy drink market. Its own Lanham Act case against N2G claims that it suffered "an immeasurable threat to [its] goodwill"[93] such that it was entitled to a preliminary injunction. The same standard applies to it in this case.

IV
CONCLUSION

Another Living Essentials' admission—"the public is interested in fair competitive practices and clearly opposed to being deceived in the marketplace"[94]—frames precisely the issue before this Court. Living Essentials' use of "*5-hour ENERGY*®" and its claims that its drink provides "**hours** of energy" and "**five hours** of energy" and "**no crash**" are literally false; they deceive the public in the marketplace. As a matter of law, this Court should issue a preliminary injunction and put a stop to Living Essentials' *5-hour ENERGY*® "five hour" and "no crash" claims—in its commercials, on its web site and on the product's label, including the *5-hour ENERGY*® name—precisely because all of them are literally false advertisements that violate § 1125 of the Lanham Act.

DATED: August 8, 2008

Respectfully submitted,

SOLOMON WARD SEIDENWURM & SMITH, LLP

By: /s/ Edward J. McIntyre
NORMAN L. SMITH
EDWARD J. MCINTYRE
ALISON L. PIVONKA
Attorneys for Hansen Beverage Company

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[91] Sacks Decl. ¶¶ 33, 35, 36.

[92] *Time Warner Cable, Inc., supra,* at 161, citing to *Coca-Cola Co., supra,* at 316. Emphasis added. *See also McNeil-PPC, supra,* at 250 ("I conclude that it is likely that Pfizer's ads will adversely affect PPC's sales, if they have not done so already.").

[93] Living Essentials' motion for a TRO and preliminary injunction, pp. 1 &13. *Innovation Ventures, LLC v. N2G Distributing, Inc. et al.*, 08-cv10983, United States District Court for the Eastern District of Michigan, Southern Division.

[94] *Id.* at 19. Emphasis added.

CERTIFICATE OF SERVICE

I caused the **HANSEN BEVERAGE COMPANY'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR PRELIMINARY INJUNCTION** to be served in the following manner:

Electronic Mail Notice List

Currently no defense counsel appear to be listed to receive e-mail notices for this case.

Mailing List

I served the following by email and Federal Express:

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Attorneys for HANSEN BEVERAGE COMPANY

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

HANSEN BEVERAGE COMPANY, a Delaware corporation, Plaintiff, v. INNOVATION VENTURES, LLC dba LIVING ESSENTIALS, a Michigan corporation, Defendant.	CASE NO. 08-CV-1166 IEG (POR) **DECLARATION OF RODNEY SACKS IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION** Date: September 15, 2008 Time: 10:30 a.m. Courtroom: 1 Hon. Irma E. Gonzalez

Rodney Sacks declares:

1. I am the Chairman of the Board and Chief Executive Officer of Hansen Beverage Company ("Hansen"). The facts in this declaration are based on my own personal knowledge.

Hansen Beverage Company.

2. Since 1992, Hansen has developed, marketed, sold, and distributed a variety of product lines in the specialty or "alternative" beverage category—including non-alcoholic beverages such as sodas, fruit juices, energy and sports drinks, smoothies, lemonades, and iced teas.

Hansen Energy Drinks.

3. In 1997 Hansen introduced Hansen's® Energy Drinks.

4. Then, in April 2002, Hansen released the first of its popular Monster Energy® drinks. The line of Monster Energy® drinks has since grown to include the Lo-Carb Monster, Monster Khaos, Monster Assault, Monster M-80, Monster Heavy Metal, and Monster Mixxd energy drinks, which also use the Monster and Monster Energy® trademarks and similar trade dress.

5. In 2004, Hansen introduced Lost® Energy™ Drinks and Rumba™. In 2005, Hansen introduced Joker Mad Energy™ drinks, a low-carb version of Lost® under the Perfect 10™ brand name as well as a new Lost® Five-O™ energy drink.

6. In 2006 Hansen introduced Ace™ Energy drinks and Unbound Energy® drinks.

7. Hansen's energy drinks have been extremely successful and achieved significant success throughout the United States. They are the favored energy drinks for millions of customers. Hansen's energy drinks are sold by more than 100,000 retail stores, including convenience stores, gas stations, supermarkets, club stores, drug stores and warehouse stores.

8. The most current Nielsen survey, June 28, 2008 demonstrates that Hansen's Monster Energy® in the 16 oz. can—the very product that Living Essentials attacks—is

now **the** market leader in the United States. Overall, Hansen enjoys a 28.3% share of the energy drink market.

Competition.

9. The energy drink industry is highly competitive. Hansen competes with "traditional" energy drinks, e.g. Red Bull Gmbh or The Coca-Cola Company.

10. Hansen also competes directly with another line of energy-drink products that market themselves as "energy shots." These "energy shots" typically come in 2 or 3 oz packages—as opposed to the "traditional" energy drinks in 8, 16 and 24 oz. cans.

11. These "energy shots" compete fiercely with "traditional" energy drinks, which they falsely characterize as "energy sodas" and "canned energy drinks."

Direct Competition Between Living Essentials and Hansen.

12. Living Essentials advertises commercially and markets its competing energy drink products, each named *5-hour ENERGY®*, and each of which Living Essentials publicly claims produces **five hours** of energy.

13. Living Essentials characterizes its energy drinks as "energy shots" and markets its products as "different" and "superior" to energy drinks.

14. Living Essentials specifically contrasts its "energy shots" not only with "canned" energy drinks in general but specifically with Hansen's energy drinks.

15. As Living Essentials' advertising makes clear, it is attempting to lure away potential customers to its 2 oz. drink—that it claims delivers five hours of energy and no "crash"—as opposed to Hansen's 8 or 16 oz. drink.

16. One *5-hour ENERGY®* advertisement, for example, leaves no doubt by its ingredient "contrast" that Living Essentials is targeting Hansen's Monster Energy® drink in the 16oz can, even though it does not specifically identify the Hansen "popular canned energy drink" by name as Monster Energy®.

Living Essentials' Advertisements.

17. Living Essentials advertises its *5-hour ENERGY®* drinks across the United States. I have personally seen Living Essentials' advertising—on television, in print, on its

own website and on its products.

18. *5-hour ENERGY®* conspicuously makes the following claims on its drinks' containers:

- "Hours of energy now"
- "No crash later"
- "Feel it in minutes • Lasts for hours"
- "Sugar free"
- "0 net carbs"

19. *decaf 5-hour ENERGY®* conspicuously makes the following claims on the drinks' containers:

- "Hours of energy now"
- "No crash later"
- "Feel it in minutes • Lasts for hours"
- "Sugar free"
- "Decaf"
- "Only 4 calories"

20. Living Essentials' false statements are not limited to the advertisements on its own packages.

21. One *5-hour ENERGY®* commercial states:

Why do energy drinks make you crash? One minute you're wired up. The next you feel worse than before. The answer is large amounts of sugar and caffeine. But with 5-Hour Energy you could sail through your day with no jitters or crash. It contains B Vitamins for energy and amino acids for focus, zero sugar and only 8 calories. Drink it in seconds and in minutes you're feeling alert and productive and that feeling lasts for hours. 5-Hour Energy. Hours of energy now. No crash later. Available at these fine stores.

22. Another *5-hour ENERGY®* commercial states:

Why are energy drinks bad? 12 spoons of sugar, that's bad. 200 calories, bad. Guarana, tisk, tisk. Good for a short jittery burst, then a dehabilitating crash. So don't drink energy drinks, drink 5-Hour Energy. It's not a drink, more like a sip. Well with that sip you'll feel alert and focused for hours, without the crash or jitters. It has zero sugar, only 4 calories and no guarana. 5-Hour Energy. Hours of energy now. No crash later.

23. In addition, this *5-hour ENERGY®* advertisement is aimed directly at Hansen since its Monster Energy® drink derives its calories from sugar and it is the only major energy drink that contains guarana, a plant that provides caffeine.

24. And another Living Essentials' advertisement claims:

> This is you after an energy drink. Unfortunately, so is this. Why do energy drinks make you crash? One minute you're wired up. The next you feel worse than before. The answer is large amounts of sugar and caffeine. That's why you should try a new liquid energy shot called 5 Hour Energy. With 5 Hour Energy, you can leave grogginess behind and sail through your day without feeling jittery, tense or, you know. That's because 5 Hour Energy contains a powerful blend of B Vitamins for energy and amino acids for focus, alertness and better mood. There is zero sugar, about as much caffeine as a cup of coffee and only 4 calories. The 2-ounce shot takes just seconds to drink and in minutes you're feeling bright, awake and productive and that feeling lasts for hours. So if your energy drink makes you crash, switch to 5 Hour Energy. Hours of energy now, no crash later. Find out if 5 Hour Energy is right for you. It's available at these fine stores, or for more information go to 5hourenergy.com.

Living Essentials' Admission.

25. In spite of the name, *5-hour ENERGY®*, and Living Essentials' touting "energy" on its product containers and throughout all its advertizing, Living Essentials admits that its "energy product" produces **no energy**.

26. When confronted with the obvious discrepancies between its disclosed ingredients and the generally accepted principles of physics, biochemistry, pharmacology and physiology, Living Essentials had to admit:

> If 5-Hour Energy contains zero net carbohydrates, from where does it derive its energy?
>
> 5-Hour Energy works to provide mental alertness, focus and improved mood rather than physical energy.[1]

Living Essentials Specifically Targets Hansen and its Products.

27. Living Essentials' statements that energy drinks containing "12 spoons of sugar, that's bad. 200 calories, bad. Guarana, tisk, tisk." by clear reference falsely disparage Hansen energy drinks that contain the ingredients to which Living Essentials refers.

28. Living Essentials' statements—energy drinks are "good for short jittery bursts, then a dehabilitating crash" and "One minute you're wired up. The next you feel worse than before" and "the answer is large amounts of sugar and caffeine" and "with 5-

hour ENERGY® you can leave grogginess behind and still do your day without feeling jittery and tense"—also by clear reference to Hansen's Monster Energy® falsely disparage and imputes adverse characteristics to and consequences of Hansen's energy drinks.

29. Such statements falsely suggest that Hansen's energy drinks contain large amounts of sugar and caffeine which produce negative results that *5-hour ENERGY®* drinks do not—in spite of the fact that *5-hour ENERGY®* drinks contain even higher levels of caffeine than Hansen's energy drinks.

30. The statements are also literally false statements about *5-hour ENERGY®*, based on Living Essentials' own admission and , as our scientist, Dr. Thomas Davis, Ph.D., testifies, based on the drink's ingredients and the generally accepted principles of biochemistry, pharmacology and physiology.

Hansen's Irreparable Injury and Balance of Hardship.

31. Living Essentials admits, in court and USPTO filings, that it spends more than $40 million on advertising through every media and that its advertising is very successful. It claims sales in excess of $100 million in sales in only three years and of more than $22 million in January and February 2008 alone.

32. Living Essentials' literally false statements about its own products, and its false statements, by unmistakable inference, about Hansen's energy drinks, have influenced, and will continue to influence, the purchasing decisions of substantial numbers of consumers and actually deceive or will have the tendency to deceive a substantial segment of the reasonable consumer audience.

33. Hansen has suffered and will continue to suffer irreparable harm as a result of Living Essentials' false statements—in particular the literally false statements about *5-hour ENERGY®*—because it is a practical impossibility for Hansen to "counter" Living Essentials' false advertising both about its own product and its disparagement of

[1] This admission, however, is not on any product container or in any advertisement. Rather, Living Essentials buries it among the FAQs on a page on its website—and well down the page at that. Emphasis is added.

Hansen's.

34. Although Hansen initiated this action against Living Essentials on July1, 2008 and served it on the same day, Living Essentials has persisted in the same false and misleading advertisements. Its own conduct makes clear that, without this Court's injunction, Living Essentials will continue in the same course of conduct and Hansen will continue to suffer irreparable harm.

35. I believe that Living Essentials' ads have adversely affected Hansen's sales, even though I cannot quantify precisely by how much; certainly that they are most likely to do so into the future.

36. Money damages are patently inadequate to compensate Hansen for the harm it has and will continue to suffer precisely because Hansen cannot know or accurately measure sales it has lost as a direct or at least essential result of Hansen customers purchasing Living Essentials' products instead of Hansen's specifically because of Living Essentials' false advertising. Hansen also cannot know or accurately measure sales lost as a direct or at least substantial result of potential customers having been driven away.

I declare on penalty of perjury under the laws of the State of California and the United States of America that the facts in this declaration are true and correct, based on my own personal knowledge and on information from our science expert which I believe to be true and correct, and that I executed this declaration in Corona, California, on August 7, 2008.

RODNEY SACKS

CERTIFICATE OF SERVICE

I caused the **DECLARATION OF RODNEY SACKS IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION** to be served in the following manner:

Electronic Mail Notice List

Currently no defense counsel appear to be listed to receive e-mail notices for this case.

Mailing List

I served the following by email and Federal Express:

Mark B. Mizrahi, Esq. Belasco Jacobs & Townsley, LLP Howard Hughes Center 6100 Center Drive, Suite 630 Los Angeles, CA 90045 Telephone: (310) 743-1188 Facsimile: (310) 743-1189 mmizrahi@bjtlaw.com Attorneys for Innovation Ventures LLC dba Living Essentials	**Of Counsel:** Mark A. Cantor, Esq. Mark Lorelli, Esq. Brooks Kushman P.C. 1000 Town Center, 22d Floor Southfield, MI 48075 Telephone: (248) 358-4400 Facsimile: (248) 358-3351 mcantor@brookskushman.com mlorelli@brookskushman.com Attorneys for Innovation Ventures LLC dba Living Essentials

/s/ Edward J. McIntyre
EDWARD J. MCINTYRE

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

HANSEN BEVERAGE COMPANY, a Delaware corporation, Plaintiff, v. INNOVATION VENTURES, LLC dba LIVING ESSENTIALS, a Michigan corporation, Defendant.	CASE NO. 08-CV-1166 IEG (POR) **DECLARATION OF THOMAS P. DAVIS, Ph.D. IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION** Date: September 15, 2008 Time: 10:30 a.m. Courtroom: 1 Hon. Irma E. Gonzalez

Thomas P. Davis, Ph.D. declares:

1. I am and have been Hansen Beverage Company's ("Hansen") Technical Director continuously since January of 1981. I am and have been a Professor of Medical Pharmacology, also continuously since January of 1981. I have a Ph.D. in physiology and biochemistry, awarded in 1978 from the University of Missouri. I had post-doctoral training at a major pharmaceutical company from 1978 to 1981. I attach the first four pages of my curriculum vitae as Exhibit 1.

2. I have extensive experience in both juice (since 1964) and carbonated beverages (since 1980). I am familiar with the ingredients of and the advertisements for Living Essentials' *5-hour ENERGY®* drink.

3. *5-hour ENERGY®* conspicuously makes these claims on the current labels on its drink containers:

- "Hours of energy now"
- "No crash later"
- "Sugar free"
- "0 net carbs"
- "Feel it in minutes • Lasts for hours"

4. Based on Living Essentials' own admissions in its advertisements and labels and based on the drink's ingredients and the generally accepted principles of biochemistry, pharmacology, and physiology, in my expert opinion, in addition to Living Essentials' claims, the product's very name, *5-hour ENERGY®*, is a literally false claim about this product, as it necessarily states or at least implies that the product produces five hours of energy.

5. As I explain below, this product does not, and cannot, produce energy, a defined scientific term, for the period of time that Living Essentials claims, in any measurable amount (if its products produce energy at all) and certainly not five hours of energy. I understand that Living Essentials even admits on its web site that its products do not produce "physical energy." As I explain below, energy is a measurable physical fact.

6. In addition, for the same reasons, Living Essentials' claims—specifically, "5-

Hour Energy;" "Hours of energy now;" "No crash later;" "Feel it in minutes," "Lasts for hours;"—are literally false statements about *5-hour ENERGY*®. Let me explain why.

7. By way of introduction, I should explain that "energy" is a scientific term and is defined in all physics textbooks and all biochemistry textbooks as well as in online resources such as Wikipedia. This is a portion of Wikipedia's discussion: "Energy is often defined as the ability to do work.... In biology, chemical bonds are broken and made during metabolic processes, and the associated changes in available energy are studied in the subfield of bioenergetics. Energy is often stored by cells in the form of substances such as carbohydrate molecules (including sugars) and lipids, which release energy when reacted with oxygen." (http://en.wikipedia.org/wiki/Energy.)

8. There is a direct relationship between calories and energy. "Throughout the history of science, energy has been expressed in several different units such as ergs and calories. At present, the accepted unit of measurement for energy is the SI [International System of Units] unit of energy, the joule." (http://en.wikipedia.org/wiki/Energy.) Food energy, however, is often stated in calories, and the conversion from joules to energy calories is a simple mathematical exercise: one joule is equal to 0.239 energy calories. [The scientific term Kilocalorie, 1000 energy calories, is equivalent to the term used by food nutritionists, "Calorie," often used with a capital "C" to avoid confusion.]

9. A human being requires a certain number of calories of energy every day, even without exercise, simply to exist. These calories of energy are required to maintain what is known as "basal metabolic rate" (BMR) in any man or woman, and an average BMR rate is about 1266 Kcal or food Calories per day. This is the basic requirement even if that person was at rest all day. This daily requirement, or BMR rate, breaks down to about 53 Kcalories per hour or 0.879 Kcalories per minute. Of course, a moderate amount of exercise per minute, hour, day, or week increases the basic requirement dramatically.

10. Mental energy or brain metabolism is defined scientifically as the degree or level of glucose metabolism in the brain. It can be followed carefully by imaging techniques in humans and is easily quantified. The brain uses glucose as a source of energy and will

starve the rest of the body's stores of glucose if needed to supply the brain. In times of severe starvation, the brain may use free fatty acids to survive but this is usually near death.

11. Mental energy can be thought of as cognitive ability or the ability to reason or intelligence quotient. Reason, cognition and integration, however, all require glucose as the energy source. Brain neurons cannot fire without glucose as they also require calories in the form of glucose to function.

12. Without glucose to deliver to the brain, one can die. The brain needs many calories per minute, per hour, per day, consuming 20% of total calories available to the human body. It is the second most calorie dependent organ in the human body; the liver is first because of its size. In fact, there is no type of human energy that does not require consumption and burning of calories. The only energy-yielding nutrients are proteins, carbohydrates, alcohol, and fats.

13. There are no calories in vitamins. As a result, vitamins cannot be energy-yielding nutrients. Vitamins can aid energy production as co-factors of energy producing cellular reactions, but alone they provide no calories. In other words, they cannot be broken down for energy.

14. Similarly, for all practical purposes, amino acids contain no caloric energy. Again, only fats, carbohydrates, alcohol, and proteins contain calories. Single amino acids do not contribute to a human's energy requirement in calories. However the single amino acid Taurine does function to stabilize and "strengthen" the cardiac muscle cell and support cardiac cell performance. This role is unique to Taurine.

15. A current *5-hour ENERGY®* commercial states:

> Why do energy drinks make you crash? One minute you're wired up. The next you feel worse than before. The answer is large amounts of sugar and caffeine. But with 5-Hour Energy you could sail through your day with no jitters or crash. It contains B Vitamins for energy and amino acids for focus, zero sugar and only 8 calories. Drink it in seconds and in minutes you're feeling alert and productive and that feeling lasts for hours. 5-Hour Energy. Hours of energy now. No crash later. Available at these fine stores.

16. In my expert opinion, Living Essentials' claims that "with 5-Hour Energy you could sail through your day with no jitters or crash" or that it "contains B Vitamins for

energy" or that one can "drink it in seconds and in minutes you're feeling alert and productive and that feeling lasts for hours" or that *5-hour ENERGY®* provides "Hours of energy now. No crash later" are, based on the drink's ingredients and generally accepted principles of biochemistry, pharmacology and physiology, literally false statements about *5-hour ENERGY®*. These claims and the others I discuss below are both materially and literally false.

17. Another *5-hour ENERGY®* commercial states:

> Why are energy drinks bad? 12 spoons of sugar, that's bad. 200 calories, bad. Guarana, tisk, tisk. Good for a short jittery burst, then a dehabilitating crash. So don't drink energy drinks, drink 5-Hour Energy. It's not a drink, more like a sip. Well with that sip you'll feel alert and focused for hours, without the crash or jitters. It has zero sugar, only 4 calories and no guarana. 5-Hour Energy. Hours of energy now. No crash later.

18. In my expert opinion, Living Essentials' claims in this as well as additional advertisements that "you'll feel alert and focused for hours without the crash or jitters" or that *5-hour ENERGY®* provides "Hours of energy now. No crash later" are false based on the drink's ingredients, the concentration of those ingredients, and generally accepted principles of biochemistry, pharmacology and physiology.

19. And another Living Essentials' advertisement claims:

> This is you after an energy drink. Unfortunately, so is this. Why do energy drinks make you crash? One minute you're wired up. The next you feel worse than before. The answer is large amounts of sugar and caffeine. That's why you should try a new liquid energy shot called 5 Hour Energy. With 5 Hour Energy, you can leave grogginess behind and sail through your day without feeling jittery, tense or, you know. That's because 5 Hour Energy contains a powerful blend of B Vitamins for energy and amino acids for focus, alertness and better mood. There is zero sugar, about as much caffeine as a cup of coffee and only 4 calories. The 2-ounce shot takes just seconds to drink and in minutes you're feeling bright, awake and productive and that feeling lasts for hours. So if your energy drink makes you crash, switch to 5 Hour Energy. Hours of energy now, no crash later. Find out if 5 Hour Energy is right for you. It's available at these fine stores, or for more information go to 5hourenergy.com.

20. In my expert opinion, Living Essentials' claims in this as well as additional advertisements that *5-hour ENERGY®* provides "Hours of energy now. No crash later" or "with *5-hour ENERGY®* you can leave grogginess behind and still do your day without

feeling jittery and tense or that "*5-hour ENERGY*® contains a powerful blend of B Vitamins for energy" are false based on the drink's ingredients, the concentration of those ingredients, and generally accepted principles of biochemistry, pharmacology, and physiology.

21. In my expert opinion, if Living Essentials' claims in its advertisements and on its product containers—that *5-hour ENERGY*® provides "hours of energy now," or "sail through your day with no jitters or crash," or "in minutes you're feeing alert and productive and that feeling lasts for hours, or "*5-hour ENERGY*®," or "Hours of energy now. No crash later," or "Feel it in minutes lasts for hours" or "feel alert and focused for hours, without the crash or jitters"—derive from the ingredients Living Essentials actually discloses and/or that are contained in their products, then those claims are false based on generally accepted principles of biochemistry, pharmacology and physiology and *5-hour ENERGY*® cannot and does not produce the effects claimed.

22. In my expert opinion, *5-hour ENERGY*® Decaf's ingredients, at least as disclosed—"sugar free," "Decaf," "6 mg. of caffeine," "only 4 calories"—given generally accepted principles of biochemistry, pharmacology, and physiology, do not and cannot provide "Hours of energy now," "Feel it in minutes • Lasts for hours," "No crash later," as Living Essentials claims. Those claims are also false based on the products' ingredients, in particular, the limited amount of caffeine and sugar, at least to the extent disclosed on the applicable container labels and/or that are contained in their products. It is true that specific doses of caffeine can improve performance, mental acuity and wakefulness, but advertising "hours" or "5-Hours" of energy is false given the doses present in *5-hour ENERGY*®.

23. In my expert opinion, *5-hour ENERGY*® Extra Strength's claims, including its claim derived from the name of the product itself, are false, based on the product's claims to be "sugar free" and "only 4 calories" and the product's other ingredients disclosed on the applicable container labels and/or that are contained in their products, given generally accepted principles of biochemistry, pharmacology, and physiology.

24. Even if Living Essentials were to argue that the Court should ignore every conventional definition of "energy" I discussed in paragraphs 6 through 13 and accept some

convenient broader definition of "energized feeling," as suggested by the small print on Living Essentials' website, in my expert opinion, the level of caffeine present in *5-hour ENERGY®* is not adequate to support the product claim of "hours" or "5 Hours of Energy" set out above. Caffeine can and will contribute to a "feeling of improved mental activity" and a "feeling of being energized" but not for the length of time advertised by *5-hour ENERGY®*.

25. First, Living Essentials' caffeine-free product, Decaf *5-hour ENERGY®* has little caffeine and therefore cannot claim any extended "energized feeling." Second, Living Essentials' products containing caffeine do not and cannot produce any "energized feeling" for the period of time claimed. Caffeine is rapidly absorbed from the human gut and distributes throughout the entire body where the peak blood level is reached in some 30 minutes with a biological half-life of 4 hours or less at the levels contained in *5-hour ENERGY®*. (G.B. Kaplan, et al., J. Clinical Pharmacology 37:693-703 (1997); H.G. Mandel, Food and Chemical Toxicology 40:1231-34 (2002).) Based on these facts, the *5-hour ENERGY®* name, which expressly or impliedly represents that Living Essentials' products produce five hours of energy, and certain other claims, falsely represent Living Essentials' products' attributes because *5-hour ENERGY®* does not have enough calories or caffeine to support the product claims.

I declare under penalty of perjury under the laws of the State of California and the United States of America that the facts in this declaration are true and correct, based on my own personal knowledge and on generally accepted science which I believe to be true and correct, and that I executed this declaration on August 7, 2008.

Thomas P. Davis, Ph.D.

THOMAS P. DAVIS, Ph.D.

CERTIFICATE OF SERVICE

I caused the **DECLARATION OF THOMAS P. DAVIS, Ph.D. IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION** to be served in the following manner:

Electronic Mail Notice List

Currently no defense counsel appear to be listed to receive e-mail notices for this case.

Mailing List

I served the following by email and Federal Express:

Mark B. Mizrahi, Esq. Belasco Jacobs & Townsley, LLP Howard Hughes Center 6100 Center Drive, Suite 630 Los Angeles, CA 90045 Telephone: (310) 743-1188 Facsimile: (310) 743-1189 mmizrahi@bjtlaw.com Attorneys for Innovation Ventures LLC dba Living Essentials	**Of Counsel:** Mark A. Cantor, Esq. Mark Lorelli, Esq. Brooks Kushman P.C. 1000 Town Center, 22d Floor Southfield, MI 48075 Telephone: (248) 358-4400 Facsimile: (248) 358-3351 mcantor@brookskushman.com mlorelli@brookskushman.com Attorneys for Innovation Ventures LLC dba Living Essentials

/s/ Edward J. McIntyre
EDWARD J. MCINTYRE

CURRICULUM VITAE

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I. EDUCATION

A. INSTITUTIONS, DEGREES & DATES AWARDED:

B.S., Biology, Loyola University of Los Angeles. June 9, 1973.
M.S., Physiology, University of Nevada, Las Vegas. May 18, 1975.
Ph.D., Physiology/Analytical Biochemistry, University of Missouri-Columbia. December 16, 1978.

B. MAJOR FIELDS:

Major emphasis in research is in the areas of central nervous system pharmacodynamics, neuropharmacology, neurochemistry, molecular biology and pathophysiology of the blood-brain barrier endothelium after peripheral inflammation/ hypoxia & reperfusion/stroke/pain/ pathological insult.

NEUROPHARMACOLOGY/NEUROCHEMISTRY/MOLECULAR NEUROENDOCRINOLOGY

Molecular regulation, protein trafficking and functional changes of the blood-brain and blood-cerebral spinal fluid barriers after stroke, hypoxia, or inflammatory pain.
The effects of peripheral and neuropathic pain on the molecular and functional transporter characteristics of the blood-brain barrier and tight junction protein cytoarchitecture.

BIODISTRIBUTION/ PHARMACOKINETICS/ PHARMACODYNAMICS

Biochemical, molecular and physiological characterization of the blood-brain and blood-CSF barrier and the effect of barriers on drug delivery to the CNS.
Pharmacokinetics of central drug disposition including opiates.
Bioavailability/ PKA of neuropharmaceuticals and neutraceuticals .

PRESENT TEACHING RESPONSIBILITY

Medical Pharmacology for Graduate Students- PHCL 501A (Course Director)
Undergraduate Senior Research Practicum - MCB 494. Biochemistry 499.
Undergraduate Independent Study - Chem 399, MCB 399, NRSI 399.
Cardiovascular, Pulmonary and Renal (CPR) Block of Case Based Instruction (CBI) to First Year Medical Students.

II. PROFESSIONAL AND ACADEMIC EMPLOYMENT

1973-1975 Graduate Research Assistant, Dr. David Bruce Dill's Laboratory of Applied Physiology, Desert Biology Research Institute, Boulder City, NV.

1975-1978	Graduate Research Assistant, Dr. Charles W. Gehrke's Experiment Station Chemical Laboratory, Department of Biochemistry, University of Missouri - Columbia.
1978-1980	Analytical/Development Chemist, Therapy Monitoring Venture Group, Abbott Diagnostics Division, Abbott Laboratories, Abbott Park, IL.
1981-1986	Assistant Professor - Pharmacology and Director, Laboratory of Analytical Chemistry and Mass Spectrometry, University of Arizona Health Sciences Center. Founding Director, The Arizona Cancer Center Analytical Core Laboratory. Member, Pharmacology/Toxicology Graduate Program and Arizona Cancer Center.
1986-1992	Senior Research Fellow, NASA Center for Separation Sciences, University of Arizona Biophysics Technology Laboratory, Engineering Experiment Station, College of Engineering.
1986-1991	Associate Professor - Pharmacology and Director, Laboratory of Analytical and Peptide Chemistry, University of Arizona Health Sciences Center. Member, Arizona Cancer Center.
1991-present	Professor - Pharmacology and Program in Neurosciences. Founding Director, Laboratory of Blood Brain Barrier Research, University of Arizona Health Sciences Center. Member, Arizona Cancer Center.
1994-1995	Special Volunteer, NIH. National Cancer Institute, Biomarkers and Prevention Research Branch, Rockville, MD.
1999-2007	Chair, External Advisory Committee. The Aging Brain: Cerebrovascular Mechanisms. Multi-institutional Program. University of Rochester and Socratech Biotechnology Inc., Rochester, New York.
1999-2006	Founding Director, Program in Research Integrity Education, Office of the Vice President for Research and Graduate Studies, University of Arizona.
1999-present	Member, Physiological Sciences Graduate Program and Neuroscience Graduate Program, University of Arizona.
2005-present	Professor, Bio5 Institute, University of Arizona.

III. HONORS & AWARDS

Academic Scholarship awardee to attend Loyola University of Los Angeles (1969-1973).
David Bruce Dill Awardee and Scholar in Environmental Physiology, University of Nevada (1975).
Member, Sigma XI - Honorary Research Society of North America (1977).
International Youth in Achievement Award, University of Missouri (1978).
Member, Gamma Sigma Delta – Honorary Agriculture Society, University of Missouri (1978).
Abbott Diagnostics Division Certificate of Appreciation Award, Abbott Laboratories Inc., (1979).
Member, Who's Who in the West, U.S., World and Frontier's of Science and Technology (1985).
Fellow, American Institute of Chemists (F.A.I.C.).October, 1986.
Member, Phi Beta Kappa Honorary Society (1995).
Member, Neurological Sciences III Study Section, National Institutes of Health, N.I.N.D.S. April 1992 to 1996. Brain Disorders Clinical Neurosciences (BDCN-3) Study Section, July 1996 to 2002.
Fellow, International Neuropeptide Society. July, 1998.
Member, International Organizing Committee, 4th International Conference of Cerebral Vascular Biology, Cambridge University, Cambridge UK, April 7-12, 2001.
University of Arizona Award from Chair of General Faculty and Faculty Senate, University of Arizona, "Extraordinary and Expert Service to the General Faculty of the University," March 5, 2001.
Member, International Organizing Committee, 5th International Conference of Cerebral Vascular Biology, Texas Tech University, Amarillo, TX. June 15-19, 2003.
Volunteer of the Year Award, Salpointe Catholic High School, Tucson, AZ. 2002-2003.
Member, Loyola-Marymount University, College of Science and Technology, "Alumni Wall of Fame," awarded October 18, 2003.
Member, American Heart Association Brain 2 Study Section. January, 2004.
Medallion of Appreciation, Salpointe Catholic High School Administartion and Faculty. Awarded September 10, 2006.
Elected Chair, Gordon Research Conference, "Barriers of the CNS". June 17-22, 2008.

IV. TEACHING

A. COURSES TAUGHT:

1. PHARMACOLOGY 501/801; The Pharmacological Basis of Therapeutics
   Enrollment: 100-120 Medical and Graduate Students; Spring, 1985 (Didactic lectures)
   - General Principles
   - Alcohol
   - Vitamins
   - Gout
   - Drugs of Abuse

   Spring, 1987 to 2006 (Patient Oriented Problem Solving, and Small Group Teaching)
   10 x 3 hour blocks per year.
   - Pharmacokinetics Applied to Asthma
   - Cancer Drugs
   - Treatment of essential hypertension
   - Toxicology
   - Treatment of congestive heart failure
   - Complications of analgesic therapy
   - Treatment of Myocardial Infarction
   - Antithrombotic Therapy
   - Narcotics/Analgesics

   Spring, 1992 to present (Didactic lectures)
   - Narcotics/Analgesics
   - Drugs of Abuse
2. PHARMACOLOGY 653; Neuropharmacology
   Enrollment: 20-25; Fall, 1985 to 1996.
   - Synthesis and Processing of Neuropeptides
   - Analytical Techniques in Neuropharmacology
   - Laboratory: HPLC Analysis of Peptide Metabolites
3. PHARMACOLOGY 550; Drug Metabolism and Disposition
   Enrollment: 30; Fall, 1985; 1986
   - Separation and Analysis of Drug Metabolites
   - Structural Assignments by Mass Spectrometry
4. PHYSIOLOGY 501/801; Medical Physiology
   Enrollment: 100-120; Spring, 1985; 1986; 1987; 1989; 1990; 1991; 1992; 1993; 1994 to 2001.
   - Temperature Regulation in Man
   - Adaptation to Heat
   - Problem Based Learning (16 hour blocks).
5. PHARMACOLOGY 551; Molecular Biology of Pharmacological Agents
   Enrollment: 20; Fall 1989; 1991; 1992; 1993; 1994; 1995; 1996.
   - Regulation of Neuropeptide Gene Expression
6. PHYSIOLOGY/MEDICINE 495 A/B; Principles of Neuroscience
   Enrollment: 15-20; Spring/Fall, 1988
   - Centrally Active Drugs
   - Drugs of Abuse
7. MOLECULAR AND CELLULAR BIOLOGY 494; Independent Study for Undergraduates
   Enrollment: 2-3 per semester. 3 credit hours per student per semester.
   Spring/Fall, 1985; 1986; 1987; 1990; 1991; 1992; 1993; 1994; 1995; 1996; 1997.
   - Effect of Opioid Peptides on Mu, Kappa and Delta Receptors.
   - Methods to Control Microflora in Juice Concentrates.
   - Solid Phase Synthesis of Neuropeptides.
   - Effect of Cell Passage Number and Mycoplasma on Cytogenetics of SCLC Cell Lines.

Characterization of Proteolytic Enzyme Metabolism Using Computer Modeling Techniques.
Use of MTT Assay to Predict Neuropeptide Effects in SCLC Cell Growth.
Development of a Specific and Sensitive Assay for Aminopeptidase M and Leucine.
Aminopeptidase: Application to SCLC Inhibition Studies.
Effect of Peptide Structure on *In Vitro* Enzymatic Metabolism.
Effect of Peptide Structure on Binding to Human Plasma.
Effect of Peptide Structure on Permeability through the Blood-Brain Barrier.
Demonstration of Prohormone Convertase mRNA in Small Cell Lung Cancers.

8. MOLECULAR AND CELLULAR BIOLOGY 266; Principles of Neural and General Pharmacology
Enrollment: 60; Summer 1991
9. CLINICAL ROUNDS, Department of Neurology
Enrollment: 5-20; Spring 1992; 1993
Graduate Level Lectures to Neurology Residents Concerning Polypeptide Hormones.
10. PHARMACOLOGY 696 A, Introduction to PHCL and TOX Research
Enrollment: 2-6 per semester for 3 credit hours per semester; Fall 1992 to present
Graduate Level Course Offered to Graduate Students. *Director of Course.*
11. PHYSIOLOGY 485, Undergraduate Physiology Course in Cardiovascular Physiology
Enrollment: 50 per year for 4 credit hours per semester; Spring 1999 to 2005.
12. PHYSIOLOGY 549, Survival Skills and Ethics. Graduate Course offered each Spring.
Enrollment: 50 per year for 3 credit hours per semester; Spring 2000 to 2005.
13. PHYSIOLOGY 700, Research Methodology and Physiological Sciences. Graduate Course offered each semester. Enrollment: 2 per year for 3 credit hours per semester; Spring 2000 to present.
14. PUBLIC HEALTH 696, Research Methodology and Design. Graduate course offered each semester. Enrollment: 10; Fall 2001 to 2006.
15. PHARMACOLOGY and NEUROSCIENCE 595B, Strategic Scientific Writing and Ethics.
Enrollment: 40; Fall 2003 to present.
16. PHARMACOLOGY 501A, Medical Pharmacology for Graduate Students. 3 credit course offered each Spring Semester. *Director of Course.* Enrollment 14. Spring 2008 to present.
17. CASE BASED INSTRUCTION (CBI), Cardio/Pulmonary/Renal (CPR). Medical Student Instruction offered every Spring to 15 First Year Medical Students.Spring 2007-present.

(Revised:July 11, 2008)

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Attorneys for HANSEN BEVERAGE COMPANY

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

HANSEN BEVERAGE COMPANY, a Delaware corporation,

Plaintiff,

v.

INNOVATION VENTURES, LLC dba LIVING ESSENTIALS, a Michigan corporation,

Defendant.

CASE NO. 08-CV-1166 IEG (POR)

HANSEN BEVERAGE COMPANY'S NOTICE OF LODGMENT IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

Date: September 15, 2008
Time: 10:30 a.m.
Courtroom: 1

Hon. Irma E. Gonzalez

Hansen Beverage Company ("Hansen") lodges the following documents and items in support of its motion for preliminary injunction:

Exhibit 1: Living Essentials' Motion for a Temporary Restraining Order and a Preliminary Injunction. *Innovation Ventures, LLC v. N2G Distributing, Inc. et al.*, 08-cv-10983, United States District Court for the Eastern District of Michigan, Southern Division. Pursuant to the provisions of Federal Rule of Evidence 201, Hansen requests the Court to take judicial notice of this document.

Exhibit 2: Declaration of Scott Henderson in support of Living Essentials' Motion for a Temporary Restraining Order and a Preliminary Injunction. (Exhibit D in support of Motion). *Innovation Ventures, LLC v. N2G Distributing, Inc. et al.*, 08-cv-10983, United States District Court for the Eastern District of Michigan, Southern Division. Hansen requests that the Court take judicial notice of this document.

Exhibit 3: Declaration of Scott Henderson in Support of Living Essentials' Trademark application before the United States Patent and Trademark Office. Hansen requests that the Court take judicial notice of this document.

Exhibit 4: Disk containing three *5-hour ENERGY®* commercials aired by Living Essentials.

Exhibit 5: A 2 oz. bottle of *5-hour ENERGY®*.

DATED: August 8, 2008

SOLOMON WARD SEIDENWURM & SMITH, LLP

By: */s/ Edward J. McIntyre*
NORMAN L. SMITH
EDWARD J. MCINTYRE
ALISON L. PIVONKA
Attorneys for Hansen Beverage Company

CERTIFICATE OF SERVICE

I caused the **HANSEN BEVERAGE COMPANY'S NOTICE OF LODGMENT IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION** to be served in the following manner:

Electronic Mail Notice List

Currently no defense counsel appear to be listed to receive e-mail notices for this case.

Mailing List

I served the following by email and Federal Express:

Mark B. Mizrahi, Esq. Belasco Jacobs & Townsley, LLP Howard Hughes Center 6100 Center Drive, Suite 630 Los Angeles, CA 90045 Telephone: (310) 743-1188 Facsimile: (310) 743-1189 mmizrahi@bjtlaw.com Attorneys for Innovation Ventures LLC dba Living Essentials	**Of Counsel:** Mark A. Cantor, Esq. Mark Lorelli, Esq. Brooks Kushman P.C. 1000 Town Center, 22d Floor Southfield, MI 48075 Telephone: (248) 358-4400 Facsimile: (248) 358-3351 mcantor@brookskushman.com mlorelli@brookskushman.com Attorneys for Innovation Ventures LLC dba Living Essentials

/s/ Edward J. McIntyre
EDWARD J. MCINTYRE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

INNOVATION VENTURES, LLC,
d/b/a LIVING ESSENTIALS,
a Michigan limited liability company,

Plaintiff,

Hon. PAUL D. BORMAN

vs.

CIVIL ACTION NO. 2:08-CV-10983

N2G DISTRIBUTING, INC.,
a California corporation, and

ALPHA PERFORMANCE LABS,
a Nevada corporation,

Defendants.

JURY TRIAL DEMANDED

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PLAINTIFF LIVING ESSENTIALS' MOTION FOR A TEMPORARY RESTRAINING ORDER AND A PRELIMINARY INJUNCTION

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EXHIBIT 1.01

Pursuant to Rule 65 of the *Federal Rules of Civil Procedure*, Plaintiff Innovation Ventures, LLC d/b/a Living Essentials ("Living Essentials") respectfully moves the Court for the entry of a temporary restraining order and a preliminary injunction, enjoining Defendants N2G Distributing, Inc. and Alpha Performance Labs (collectively "Defendants"), their officers, employees, agents, successors and assigns, and all those in active concert and participation with them, and each of them who receives notice directly or otherwise of such injunction, from:

(1) imitating, copying, or making any unauthorized use of the 5 HOUR ENERGY® Trademark (attached as Exhibit A) and Packaging Trade Dress (attached as Exhibit B);

(2) importing, manufacturing, producing, distributing, circulating, selling, offering for sale, advertising, promoting or displaying Defendants' "6 Hour Energy" supplement illustrated in Exhibit C;

(3) importing, manufacturing, producing, distributing, circulating, selling, offering for sale, advertising, promoting or displaying any service or product using any simulation, reproduction, counterfeit, copy, or colorable imitation of either the 5 HOUR ENERGY® Trademark and Packaging Trade Dress;

(4) using any simulation, reproduction, counterfeit, copy or colorable imitation of the 5 HOUR ENERGY® Trademark and Packaging Trade Dress in connection with the promotion, advertisement, internet promotion, display, sale, offer for sale, manufacture, production, circulation or distribution of any product or service;

(5) using any false designation of origin or false description (including, without limitation, any letters, symbols, or designs constituting the 5 HOUR ENERGY® Trademark and

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Packaging Trade Dress) or performing any act, which can, or is likely to, lead members of the trade or public to believe that any service or product manufactured, distributed or sold by Defendants are in any manner associated or connected with Living Essentials, the 5 HOUR ENERGY® brand, or the 5 HOUR ENERGY® Trademark and Packaging Trade Dress, or is sold, manufactured, licensed, sponsored, approved or authorized by Living Essentials.

The entry of a temporary restraining order and preliminary injunction against Defendants is necessary to prevent Living Essentials from continuing to be irreparably harmed by Defendants' unauthorized use of Living Essentials' 5 HOUR ENERGY® Trademark and Packaging Trade Dress. Defendants have used and continue to use, as of the date of this Motion, Plaintiff's marks on Defendants' products and packaging, in their advertising, and on their internet websites. These facts and evidence, which fully support Living Essentials' application for injunctive relief, are set forth more fully in Living Essentials' Brief In Support Of Its Motion For a Temporary Restraining Order and Preliminary Injunction, in the Complaint on file herein, and by the exhibits thereto.

This is not an *ex parte* request. Living Essentials has provided notice to Defendants' counsel of this motion and has already discussed scheduling with the Court and with opposing counsel. In these same efforts, counsel for Living Essentials has complied with L.R. 7.1 and has sought concurrence in the relief sought by this motion. No concurrence was obtained.

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Respectfully submitted,

BROOKS KUSHMAN P.C.

By: /s/ Marc Lorelli

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Dated: March 13, 2008

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CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that on March 13, 2008, I electronically filed the foregoing **PLAINTIFF LIVING ESSENTIALS' MOTION FOR A TEMPORARY RESTRAINING ORDER AND A PRELIMINARY INJUNCTION AND BRIEF IN SUPPORT** with the Clerk of the Court for the Eastern District of Michigan using the ECF System which will send notification to the following registered participants of the ECF System as listed on the Court's Notice of Electronic Filing:

I also certify that I have mailed by United States Postal Service the paper to the following non-participants in the ECF System:

Daniel A. Reed
Varner & Brandt
3750 University Avenue
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BROOKS KUSHMAN P.C.

By: /s/ Marc Lorelli
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Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

INNOVATION VENTURES, LLC,
d/b/a LIVING ESSENTIALS,
a Michigan limited liability company,

Plaintiff,

Hon. **PAUL D. BORMAN**

vs.

CIVIL ACTION NO. 2:08-CV-10983

N2G DISTRIBUTING, INC.,
a California corporation, and

ALPHA PERFORMANCE LABS,
a Nevada corporation,

Defendants.

JURY TRIAL DEMANDED

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PLAINTIFF LIVING ESSENTIALS' BRIEF IN SUPPORT OF ITS MOTION FOR A TEMPORARY RESTRAINING ORDER AND A PRELIMINARY INJUNCTION

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EXHIBIT 1.06

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EXHIBIT 1.10

ISSUE PRESENTED

Whether a temporary restraining order and preliminary injunction should issue enjoining Defendants from further infringement of Plaintiff's 5 HOUR ENERGY® Trademark and Packaging Trade Dress rights in connection with their advertising and sale of a knock-off product pending the judgment in this case?

Plaintiff Living Essentials answers: ***Yes***

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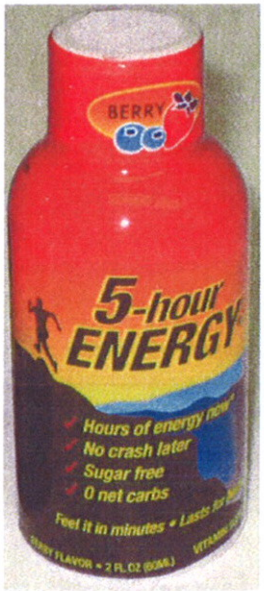
I. INTRODUCTION

Over the last three and one-half years, plaintiff Innovations Ventures, LLC d/b/a Living Essentials ("Living Essentials") has sold a supplement under the 5 HOUR ENERGY® Trademark and Packaging Trade Dress as illustrated below.



The 5 HOUR ENERGY® supplement has been widely successful. In just over three years, revenue from the sales of the 5 HOUR ENERGY® product has exceeded $110,000,000. Living Essentials has also invested substantially in advertising and marketing. Living Essentials has spent over $30,000,000 in advertising and marketing in connection with the 5 HOUR ENERGY® Trademark and Packaging Trade Dress. These sales and expenditures demonstrate the strength of Living Essentials' brand. Indeed, the 5 HOUR ENERGY® supplement is one of the most, if not the most, successful supplements on the market today.

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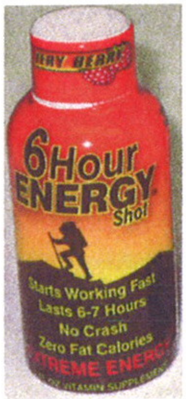
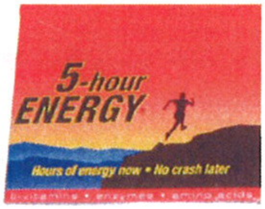
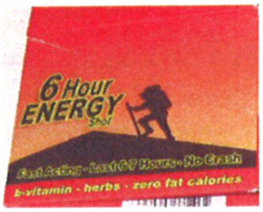
In an effort to trade on Living Essentials' successful and recognized brand, the defendants N2G Distributing, Inc. and Alpha Performance Labs (collectively "Defendants") have *just recently introduced* a supplement that includes a knock-off of Living Essentials' mark. As shown below, Defendants copied everything from the terrain climber at sunrise bottle to the box that the supplements are shipped and displayed in.

5-hour
ENERGY
Hours of energy now
No crash later
Sugar free
0 net carbs


6 Hour
ENERGY
Shot
Starts Working Fast
Lasts 6-7 Hours
No Crash
Zero Fat Calories


5-hour
ENERGY
Hours of energy now • No crash later


6 Hour
ENERGY
Shot
b-vitamin - herbs - zero fat calories

LIVING ESSENTIALS **DEFENDANTS**

Living Essentials seeks a temporary restraining order and preliminary injunction against Defendants to prevent Defendants' unauthorized use of Living Essentials' 5 HOUR ENERGY® Trademark and Packaging Trade Dress. There is a strong likelihood of success on the merits. Indeed, in the Sixth Circuit, copying creates a presumption of likelihood of confusion —

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the touchstone of Living Essentials' claims in this case. Also, every day that the Defendants are allowed to offer to sell and distribute, Living Essentials is irreparably harmed. Living Essentials has essentially lost the ability to control which products its reputation and goodwill are being used to promote or endorse. This lack of control and potential damage to Living Essentials' reputation constitutes irreparable injury because monetary damages cannot adequately compensate for this harm to Plaintiff's goodwill and reputation.

II. BACKGROUND FACTS

The facts set forth in this section are supported by the Declaration of Scott Henderson, attached hereto as Exhibit D.

1. Plaintiff, Innovation Ventures, LLC, d/b/a Living Essentials (hereinafter "Living Essentials"), is a Michigan limited liability company, having its principal offices at 46570 Humboldt Drive, Novi, Michigan 48377.

2. Living Essentials is a national marketer and distributor of nutritional and dietary supplements sold under its many trademarks.

3. Living Essentials is the owner of the 5 HOUR ENERGY® Trademark used by Living Essentials since September 2004 as a trademark for use with the 5 HOUR ENERGY® supplement.

4. The 5 HOUR ENERGY® Trademark was duly and lawfully registered on September 27, 2005 and is currently registered on the Supplemental Register in the United States Patent and Trademark Office as U.S. Registration No. 3,003,077 ("the '077 registration"). A copy

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of the Certificate of Registration for this Trademark is attached as Exhibit A to the Henderson Declaration.

5. Living Essentials has used the 5 HOUR ENERGY® Trademark of the '077 registration as its trademark continuously since September 2004 to the present in connection with its supplements, including in connection with promotion, marketing and advertising of supplements.

6. Living Essentials is the owner of the 5 HOUR ENERGY® Packaging Trade Dress used since September 2004 by Living Essentials as packaging for its 5 HOUR ENERGY® product in connection with its supplements, including in connection with promotion, marketing and advertising of supplements, for sale throughout the United States.

7. The 5 HOUR ENERGY® Packaging Trade Dress consists of the packaging illustrated in Exhibit B to the Henderson Declaration. The 5 HOUR ENERGY® Packaging Trade Dress includes the terrain climber at sunrise design, the color scheme, the presentation of the 5 HOUR ENERGY® Trademark, and the shape of the bottle which includes a short neck and a main container with broad shoulders.

8. The 5 HOUR ENERGY® Packaging Trade Dress is arbitrary, non-functional, and distinctive. The terrain climber at sunrise bottle is not essential to the use or purpose of the supplement and does not affect the cost or quality of the supplement. Instead, the terrain climber at sunrise bottle is an arbitrary and fanciful design that is used for source identification.

9. The 5 HOUR ENERGY® Trademark and Packaging Trade Dress has been extensively, continuously, and exclusively used by Living Essentials since September 2004, is

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inherently distinctive, and has become distinctive through the acquisition of "secondary meaning." Living Essentials has spent over $30,000,000 in advertising and marketing related to the 5 HOUR ENERGY® Trademark and Packaging Trade Dress. Living Essentials has used a nationwide network of distributors and has generated over $110,000,000 on its sales of the 5 HOUR ENERGY® product. As a result of such continuous use and extensive sales, advertising and promotion of the 5 HOUR ENERGY® Trademark and Packaging Trade Dress by Living Essentials, the marks and products associated with the 5 HOUR ENERGY® Trademark and Packaging Trade Dress are recognized by the public as emanating from Living Essentials.

10. The 5 HOUR ENERGY® Trademark and Packaging Trade Dress symbolizes business goodwill of Living Essentials, and is an intangible asset of substantial commercial value.

11. On information and belief, Defendant, N2G Distributing, Inc., is a California corporation, having its principal place of business at 8020 Palm Avenue, Suite D, Highland, California 92346.

12. On information and belief, Defendant Alpha Performance Labs, is a Nevada corporation, having its principal place of business at 5448 Painted Gorge Drive, Las Vegas, Nevada 89149.

13. Less than two weeks ago, Living Essentials came to learn that the Defendants were advertising, distributing and taking orders for a supplement that included an imitation of Living Essentials' 5 HOUR ENERGY® Trademark and Packaging Trade Dress. Defendants exhibited at a trade show in Nevada that included many of Living Essentials' distributors and customers. At the trade show, Defendants were distributing samples and taking

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orders for a supplement that included an imitation of Living Essentials' 5 HOUR ENERGY® Packaging Trade Dress and merely modified the 5 HOUR ENERGY® Trademark to "6 Hour Energy." Defendants' advertising also indicated that their supplement is "available nationwide."

14. In addition to their activity at the Nevada trade show, Defendants offer for sale and sell their product bearing imitations of Living Essentials' 5 HOUR ENERGY® Trademark and Packaging Trade Dress over the Internet and via phone orders to consumers nationwide. Defendants also have a distribution center in Michigan.

15. Defendants have no consent, license, approval or other authorization to use the 5 HOUR ENERGY® Trademark and Packaging Trade Dress in connection with their products.

16. Based on the success of Living Essentials and a review of the products themselves, it is clear that Defendants copied Living Essentials' Trademark and terrain climber sunrise bottle in its product. Defendants also copied Living Essentials' "caution" verbatim which further shows intentional copying by the Defendants. Defendants' actions illustrate a calculated attempt to misrepresent the source of Defendants' goods so as to cause confusion, mistake or to deceive as to Defendants' connection or association with Living Essentials.

17. Defendants' advertising and sale of products of unknown quality, including imitations of the 5 HOUR ENERGY® Trademark and Packaging Trade Dress, damages the reputation of Living Essentials and has stripped Living Essentials of the ability to control which products its reputation and goodwill are being used to promote or endorse.

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III. ARGUMENT

Four factors are relevant in considering a motion for preliminary injunction: "(1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury without the injunction; (3) whether issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuance of the injunction." *Rock & Roll Hall of Fame & Museum, Inc. v. Gentile Prods.*, 134 F.3d 749, 753 (6th Cir. 1998); *see also, McPherson v. Michigan High Sch. Athletic Ass'n*, 119 F.3d 453, 459 (6th Cir. 1997) (en banc). In the Sixth Circuit, these considerations are not "prerequisites" to the issuance of a preliminary injunction; they are factors to be "balanced" by the court. *See, Unsecured Creditors' Comm. of DeLorean Motor Co. v. DeLorean (In re Delorean Motor Co.)*, 755 F.2d 1223, 1229 (6th Cir. 1985).

Thus, a strong showing as to likelihood of success on the merits may justify entry of a preliminary injunction upon a relatively lesser showing of irreparable harm. Conversely, proof that the moving party will suffer significant irreparable injury may justify a preliminary injunction on a lesser showing of likelihood of success. *See, In re DeLorean Motor Co.*, 755 F.2d at 1229 (holding that "the likelihood of success that need be shown will vary inversely with the degree of injury the plaintiff will suffer absent an injunction"). In other words, a moving party may be entitled to a preliminary injunction either upon a showing of "a strong or substantial probability of ultimate success on the merits," or on a showing of "serious questions going to the merits and irreparable harm which decidedly outweighs any potential harm to the defendant if an injunction is issued." *Friendship Materials, Inc. v. Michigan Brick, Inc.*, 679 F.2d 100, 105 (6th Cir. 1982).

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Living Essentials easily qualifies for preliminary injunctive relief because there is a strong likelihood that Living Essentials will succeed on the merits and the balance of hardships tips decidedly in Living Essentials' favor. Indeed, preliminary injunctive relief is routinely granted in trademark cases on the basis of the important presumption that consumer confusion creates irreparable harm to the goodwill and reputation of the trademark owner. *See, Lone Star Steakhouse & Saloon, Inc. v. Alpha of Virginia, Inc.*, 43 F.3d 922, 939 (4th Cir. 1995) ("[W]e recognize that irreparable injury regularly follows from trademark infringement.").

IV. LIVING ESSENTIALS IS HIGHLY LIKELY TO SUCCEED ON THE MERITS

For the reasons set forth below, Living Essentials is highly likely to succeed on the merits of its claims for trademark infringement, trade dress infringement, and related counts.

The essential element of Living Essentials' claims for trademark infringement is whether Defendants have used a reproduction or colorable imitation of its Trademark and Packaging Trade Dress in commerce which is likely to cause confusion, or to cause mistake, or to deceive. *See,* 15 U.S.C. § 1114(1)(a). Living Essentials' claim for trade dress infringement, false designation of origin or sponsorship requires similar proof of likelihood of confusion "as to the affiliation, connection, or association" of Defendants with Living Essentials, or "as to the origin, sponsorship, or approval" of Defendants' products or services by Living Essentials. *See*, 15 U.S.C. § 1125(a)(1). Likelihood of confusion is the touchstone of Living Essentials' claims in this case.

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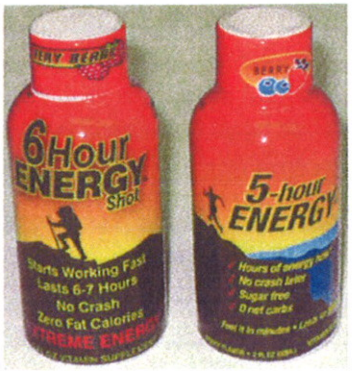
A. There Is Clearly A Likelihood Of Confusion Between Living Essentials' 5 HOUR ENERGY® Trademark And Packaging Trade Dress And Defendants' Imitation

Living Essentials' preliminary showing of likelihood of confusion is compelling. Even at this early stage, it is clear that Living Essentials will easily establish that consumers will likely be confused by Defendants' copy of Living Essentials' 5 HOUR ENERGY® Trademark and Packaging Trade Dress in their product packaging, and in their sale and advertising of supplements. The similarity between Living Essentials' Trademark and Packaging Trade Dress and Defendants' products is undeniable.



DEFENDANTS **LIVING ESSENTIALS**

Defendants' supplement includes the same terrain climber at sunrise design, the same color scheme, the same presentation of the trademark, and the same size and shape of the bottle as Living Essentials' supplement. The lone alteration of 5 HOUR ENERGY® to "6 Hour Energy" is truly insubstantial. If anything, this alteration would lead consumers to falsely believe that Defendants' product is Living Essentials' stronger version of its popular 5 HOUR ENERGY® product.

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In many cases, likelihood of confusion can be established only by making an inquiry into a number of factors, such as the similarity of the parties' marks, the extent of competition, the overlap in marketing channels, characteristics of potential purchasers, and so forth.[1] An example of such case would be a dispute between involving the use of the mark "Delta" by both Delta Airlines and Delta Faucets. Such multi-factored balancing is unnecessary in other cases (such as this one) where Defendants have misappropriated Living Essentials' trademark on goods or services that are directly competitive. In this latter set of cases, where the marks are "substantially similar as to both design and use[,] . . .the court presumes that defendant's counterfeit items caused public confusion in the marketplace." *Dive 'N Surf, Inc. v. Anselowitz*, 834 F.Supp. 379, 382 (M.D. Fla. 1993) (entering summary judgment on plaintiff's infringement claim on the ground that there was no genuine issue of fact in light of the presumption of confusion); *Ferrari S.PA. Esercizio Fabriche Automobile e Corse v. Roberts*, 944 F.2d 1235, 1243 (6th Cir. 1991); *Polo Fashions v. Craftex, Inc.*, 816 F.2d 145, 148 (4th Cir. 1987) (holding that a presumption of public confusion arises when counterfeit symbols are substantially identical to genuine symbols and are used in the same manner as the genuine symbols are used).

The Ninth Circuit has explained the difference in the two approaches as follows:

> When the goods produced by the alleged infringer compete for sales with those of the trademark owner, infringement usually will be

---

[1] The *Frisch* factors in the Sixth Circuit for determination of a likelihood of confusion include: (1) strength of the senior mark; (2) relatedness of the goods or services; (3) similarity of the marks; (4) evidence of actual confusion; (5) marketing channels used; (6) likely degree of purchaser care; (7) the intent of defendant in selecting the mark; and (8) likelihood of expansion of the product lines. *Daddy's Junky*, 109 F.3d 275. As demonstrated in the attached Declaration of Scott Henderson at paragraphs 10 and 15-18, each factor favors Living Essentials in this case.

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> found if the marks are sufficiently similar that confusion can be expected. When the goods are related, but not competitive, several other factors are added to the calculus.
>
> *AMF, Inc. v. Sleekcraft Boats*, 559 F.2d 341, 348 (9th Cir. 1979).

This presumption of confusion in cases involving sufficiently similar trademarks on competing goods or services has been widely adopted. *See, Interpace Corp. v. Lapp, Inc,* 721 F.2d 460, 462 (3d Cir. 1983) ("Where the trademark owner and the alleged infringer deal in competing goods or services, the court need rarely look beyond the mark itself."); *Playboy Enterprises, Inc. v. Chuckleberry Pub., Inc.*, 687 F.2d 563, 569 (2d Cir. 1982) (explaining that the holder of a mark "is presumptively entitled to protection from a newcomer's use of a similar mark in direct competition"); *Topps Co. v. Gerrit J. Verburg Co.*, 1996 WL 719381, *6, 41 USPQ2d 1412, 1417 (S.D. N.Y. 1996) ("Where the marks are identical and the goods are also identical and directly competitive, the decision can be made directly without a more formal and complete discussion of all of the . . . factors."); *see also, Bauer Lamp Co. v. Shaffer*, 941 F.2d 1165, 1172 (11th Cir. 1991) (holding that defendant's deliberate copying of plaintiff's trade dress creates a "presumption of likelihood of confusion"). By a simple comparison of the products, likelihood of confusion is undeniable. It is especially appropriate in this situation whether both Plaintiff and Defendants compete in the same supplement market and their products are directed to the same consumers.

Under Sixth Circuit law, copying creates a presumption of likelihood of confusion. *Ferrari S.P.A. Esercizio Fabriche Automobili e Corse v. Roberts*, 944 F.2d 1235, 1242-43 (6th Cir. 1991)(holding that "presumption of likelihood of confusion . . . follows from intentional copying");

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see also, *Frisch's Restaurants v. Elby's Big Boy, Inc.*, 670 F.2d 642, 648 (6th Cir. 1982)("since the mark was adopted with the intent of deriving benefit from the reputation of [the plaintiff,] *that fact alone may be sufficient to justify the inference that there is confusing similarity*.")(emphasis in original). This case presents a textbook example of a defendant copying a widely successful trademark and trade dress to trade off of the goodwill developed by the plaintiff. The similarities extend from the terrain climber at sunrise bottle, to the color scheme and outline of the primary logo, and to the boxes in which the bottles are displayed at the point of sale. As noted above, the Defendants even copied the caution label that Living Essentials created for its supplement as illustrated below:

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EXHIBIT 1.23

B. 5 HOUR ENERGY® Is A Widely Used And Powerful Trademark

As noted above, the 5 HOUR ENERGY® Trademark has been used exclusively by Living Essentials since at least September 2004. The 5 HOUR ENERGY® Trademark was designed to identify and distinguish 5 HOUR ENERGY® goods from those sold by others. Over the course of the last three and one-half years, Living Essentials has acquired distinctiveness in its 5 HOUR ENERGY® Trademark. Living Essentials' supplement is quite popular in the marketplace, and has generated revenue of over $110 million.

Living Essentials has also invested substantially — on the order of $30 million — in nationwide advertising and marketing to promote the trademark. Indeed, the 5 HOUR ENERGY® supplement is one of the most successful, if not the most successful, supplement in the market. Indeed, sales of Living Essentials' 5 HOUR ENERGY® supplement continue to grow quarter over quarter. In the first two months of 2008 alone, Living Essentials has sold over $22 million worth of this supplement. This success is based on the development of a quality reputation and product associated with the 5 HOUR ENERGY® Trademark.

This extensive use and marketing has led to the acquisition of acquired distinctiveness, also called secondary meaning. The Sixth Circuit typically considers seven factors for determining secondary meaning, including:

(a) direct consumer testimony;
(b) consumer surveys;
(c) exclusivity, length, and manner of use;
(d) amount and manner of advertising;
(e) amount of sales and number of customers;

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(f) established place in the market; and
(g) proof of intentional copying

Abercrombie & Fitch Stores, Inc. v. American Eagle Outfitters, Inc., 280 F.3d 619, 640 (6th Cir. 2002).

Even at this early stage, secondary meaning is clearly established by the extensive and exclusive use of the 5 HOUR ENERGY® Trademark on Living Essentials' one-dose vitamin supplement.[2] The sales, advertising and exclusive place in the market as a leading supplement cannot be disputed. While there are no surveys or consumer testimony on this record, the final factor of intentional copying is particularly significant in this case.

In the Sixth Circuit, secondary meaning can be presumed when it is apparent that the defendant intentionally copied the plaintiff's trade dress as is the case here.

> The evidence of intentional copying shows the strong secondary meaning of the Ferrari designs because "there is no logical reason for the precise copying save an attempt to realize upon a secondary meaning that is in existence." *Audio Fidelity, Inc. v. High Fidelity Recordings, Inc., 283 F.2d 551, 558 (9th Cir. 1960).*
>
> *Ferrari S.PA. Esercizio Fabriche Automobili e Corse v. Roberts*, 944 F.2d 1235, 1239 (6th Cir. 1991); *see also DAP Products v. Color Tile Manufacturing*, 821 F.Supp. 488, 492 (S.D. Ohio 1993)(Secondary meaning can be presumed where a court can infer that the defendant intentionally copied plaintiff's color scheme.)

[2] Secondary meaning is statutorily presumed based on five years of substantially exclusive use, without any showing of sales or advertisements. 15 U.S.C. § 1052(f). Here, we have three and one-half years of exclusive use coupled with hundreds of millions in sales and advertisements.

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C. The Sunrise Climber Trade Dress Is Inherently Distinctive And Non-Functional

Packaging Trade Dress is protectable when it has acquired secondary meaning **or** when it is inherently distinctive. *Wal-Mart, Inc. v. Samara Bros., Inc.*, 529 U.S. 205, 212-13 (2000)("Consumers are therefore predisposed to regard those symbols [such as 'brightly decorated plastic bottles'] as indication of the producer, which is why such symbols 'almost *automatically* tell a customer that they refer to a brand,' *514 U.S. at 162-163,* and 'immediately . . . signal a brand or a product source,"' *514 U.S. at 163.* Citing *Qualitex Co. v. Jacobson Products Co.*, 514 U.S. 159 (1995).) Here, as recognized in *Wal-Mart*, the brightly colored plastic bottle design that includes the terrain climber at sunrise is protectable trade dress[3] because it is inherently distinctive. In any event, as set forth above, the 5 HOUR ENERGY® Packaging Trade Dress has certainly acquired secondary meaning through its extensive use in the marketplace.

For a trade dress claim, Living Essentials must also show that the terrain climber at sunrise is not functional. 15 U.S.C. § 1125(a)(3). An asserted trade dress is functional if it is essential to the use or purpose of the product. Here, the design on the bottle has absolutely nothing to do with the use of purpose of the supplement and does not affect the cost or quality of the supplement. The 5 HOUR ENERGY® Packaging Trade Dress is not functional. *Abercrombie & Fitch Stores, Inc. v. American Eagle Outfitters, Inc.*, 280 F.3d 619, 642 (6th Cir. 2002). There

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[3] As noted above, the 5 HOUR ENERGY® Packaging Trade Dress includes the terrain climber at sunrise design, the color scheme, the presentation of the 5 HOUR ENERGY® Trademark, and the shape of the bottle which includes a short neck and a main container with broad shoulders – all aspects that have been copied by the Defendants.

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are countless other bottle designs that could have been employed by Defendants, but they decided to trade off of the goodwill developed by Living Essentials.

V. HARM TO LIVING ESSENTIALS' TRADEMARK IS PRESUMPTIVELY IRREPARABLE

Courts have long adopted a presumption that irreparable injury "follows as a matter of course" from the infringement of valuable trademark rights. *Opticians Ass'n of America v. Craftex, Inc.*, 816 F.2d 145, 148 (4th Cir. 1987); *Circuit City Stores, Inc. v. CarMax, Inc.*, 165 F.3d 1047, 1056 (6th Cir. 1999)("[I]rreparable injury 'ordinarily follows when a likelihood of confusion or possible risk to reputation appears' from infringement or unfair competition. . . . Thus, a court need only find that a defendant is liable for infringement or unfair competition for it to award injunctive relief.")

The presumption of irreparable injury is appropriate here. If Defendants are permitted to continue misappropriating the 5 HOUR ENERGY® Trademark and Packaging Trade Dress, Living Essentials will suffer irreparable damage to its goodwill and reputation by the loss of control over its trademarks. As another court explained:

> In the context of trademark litigation, "grounds for irreparable harm include loss of control of reputation, loss of trade, and loss of goodwill," regardless of whether the infringer is putting the mark to a good or favorable use. *S & R Corp. v. Jiffy Lube Int'l, Inc.*, 968 F.2d 371, 378 (3d Cir. 1992). Liquid Glass's unauthorized use of the Porsche marks inhibits Porsche's ability to control which products its reputation and good will are being used to promote or endorse. This lack of control and potential damage to Porsche's

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> reputation constitutes irreparable injury because monetary damages cannot adequately compensate for harm to good will or reputation.
>
> *Liquid Glass Enterprises v. Dr. Ing. h.c.F. Porsche AG*, 8 F.Supp.2d 398, 406 (D. N.J. 1998).

In other words, Plaintiff's "lack of ability to control the nature and quality of services provided under an infringing . . . mark, even if defendant matches the high quality of plaintiff's services, constitutes irreparable injury." *Fotomat Corp. v. Photo Drive-Thru, Inc.*, 425 F.Supp. 693, 711 (D. N.J. 1977).

Because of the inherent difficulty of placing a value on the damage to such intangibles as the goodwill or reputation of a business, courts routinely grant injunctions in trademark actions. *See, e.g., Aveda Corp. v. Evita Marketing, Inc.*, 706 F.Supp. 1419, 1431 (D. Minn. 1989) ("Any hardship caused by the preliminary injunction may justly fall on the parties which consciously decided to dress their goods for the market in a manner 'so near to [a] successful rival that the public may fail to distinguish between them.'"). Thus, if Defendants are permitted to continue misappropriating the 5 HOUR ENERGY® Trademark and Packaging Trade Dress, Living Essentials will suffer irreparable damage to its goodwill and reputation by the loss of control over its trademark.

In this case, there is even further irreparable damage. Defendants' product of unknown quality and Defendants' product does not include industry cautions for products that include phenylalanine.[4] Customers that have a negative reaction to Defendants' products may

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[4] Defendants' product includes L-phenylalanine on the ingredients list, but not does include a Phenylketonurics caution. *See* illustration on page 12, *infra*.

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mistakenly believe that the Defendants' product is associated or affiliated with Living Essentials. Living Essentials can no longer control its own reputation in the marketplace, and Living Essentials' reputation is at serious risk.

VI. THE BALANCE OF HARDSHIPS TIPS DECIDEDLY IN LIVING ESSENTIALS' FAVOR

Under these circumstances, the balance of hardships tips decidedly in Living Essentials' favor. While the injury to Living Essentials is immeasurable and irreparable, the only "harm" to Defendants will be an injunction against their attempts to misappropriate the 5 HOUR ENERGY® Trademark and Packaging Trade Dress by using the goodwill associated with Living Essentials to draw consumers to Defendants' business and websites, and to otherwise confuse consumers. No legitimate purpose is served by this misappropriation of the 5 HOUR ENERGY® Trademark and Packaging Trade Dress, and no cognizable injury will result. *See, Minnesota Mining and Manufacturing Company v. Taylor,* 21 F.Supp.2d 1003, 1005 (D. Minn. 1998) (finding that a preliminary injunction against defendant's misappropriation of the "POSTIT.COM" domain name would not cause "any harm" to the defendant).

Living Essentials' injury is monumental and incalculable by comparison. Living Essentials has invested substantial sums in the development and marketing of its valuable trademarks and trade dress, and Defendants' violation of Living Essentials' trademark rights poses an immeasurable threat to Living Essentials' goodwill as explained above.

To the extent there is any risk of harm to Defendants, such harm is easily calculable and cannot be deemed irreparable. At most, Defendants' losses (if any) from the injunction sought

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by Living Essentials would be a loss of revenues.[5] Where any "potential losses to the defendant are easily calculable," the balance of hardships tips strongly in the plaintiff's favor. *See, Heinz v. Frank Lloyd Wright Foundation*, 1986 WL 5996, 229 USPQ 201, 210 (W.D. Wis. 1986) (plaintiff's loss of goodwill not quantifiable, and therefore outweighs defendant's loss of sales which can be calculated).

VII. THE PUBLIC INTEREST WILL BE ADVANCED BY A PRELIMINARY INJUNCTION

Finally, the public interest also favors entry of a preliminary injunction in this case because "the public is interested in fair competitive practices and clearly opposed to being deceived in the marketplace." *Estate of Presley v. Russen*, 513 F.Supp. 1339, 1382 (D. N.J. 1981); *see also, Green Products*, 992 F.Supp. at 1081 (holding that a preliminary injunction against a defendant's misappropriation of plaintiff's trademark in a domain name advances the public interest).

[5] Any loss of revenue may be "discounted by the fact that the defendant brought that injury upon itself" by its intentional copying. *Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharmaceuticals Co.*, 290 F.3d 578 (3d Cir. 2002)(preliminary injunction against false advertising was granted and affirmed.)

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VIII. CONCLUSION

For the foregoing reasons, the Court should grant a temporary restraining order and a preliminary injunction enjoining Defendants from imitating, copying, or making unauthorized use of the 5 HOUR ENERGY® Trademark and Packaging Trade Dress in their advertisement and sale of supplements and other products.

Respectfully submitted,

BROOKS KUSHMAN P.C.

By: /s/ Marc Lorelli
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Dated: March 13, 2008

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EXHIBIT A

Int. Cl.: 5

Prior U.S. Cls.: 6, 18, 44, 46, 51, and 52

Reg. No. 3,003,077

United States Patent and Trademark Office Registered Sep. 27, 2005

TRADEMARK
SUPPLEMENTAL REGISTER

5 HOUR ENERGY

INNOVATION VENTURES, LLC (MICHIGAN [illegible]) DBA LIVING ESSENTIALS
[illegible]
WALLED LAKE, MI [illegible]

FOR: HOMEOPATHIC SUPPLEMENTS, PHARMACEUTICAL PREPARATIONS, NUTRITIONAL SUPPLEMENTS AND DIETARY SUPPLEMENTS THAT RELIEVE OR PREVENT FATIGUE, IN CLASS [illegible]

FIRST USE [illegible]; IN COMMERCE [illegible].

THE MARK CONSISTS OF STANDARD CHARACTERS WITHOUT CLAIM TO ANY PARTICULAR FONT, STYLE, SIZE, OR COLOR.

SER. NO. [illegible], FILED P.R. [illegible]; AM. S.R. [illegible]

MARK T. MULLEN, EXAMINING ATTORNEY

EXHIBIT 1.33

EXHIBIT B

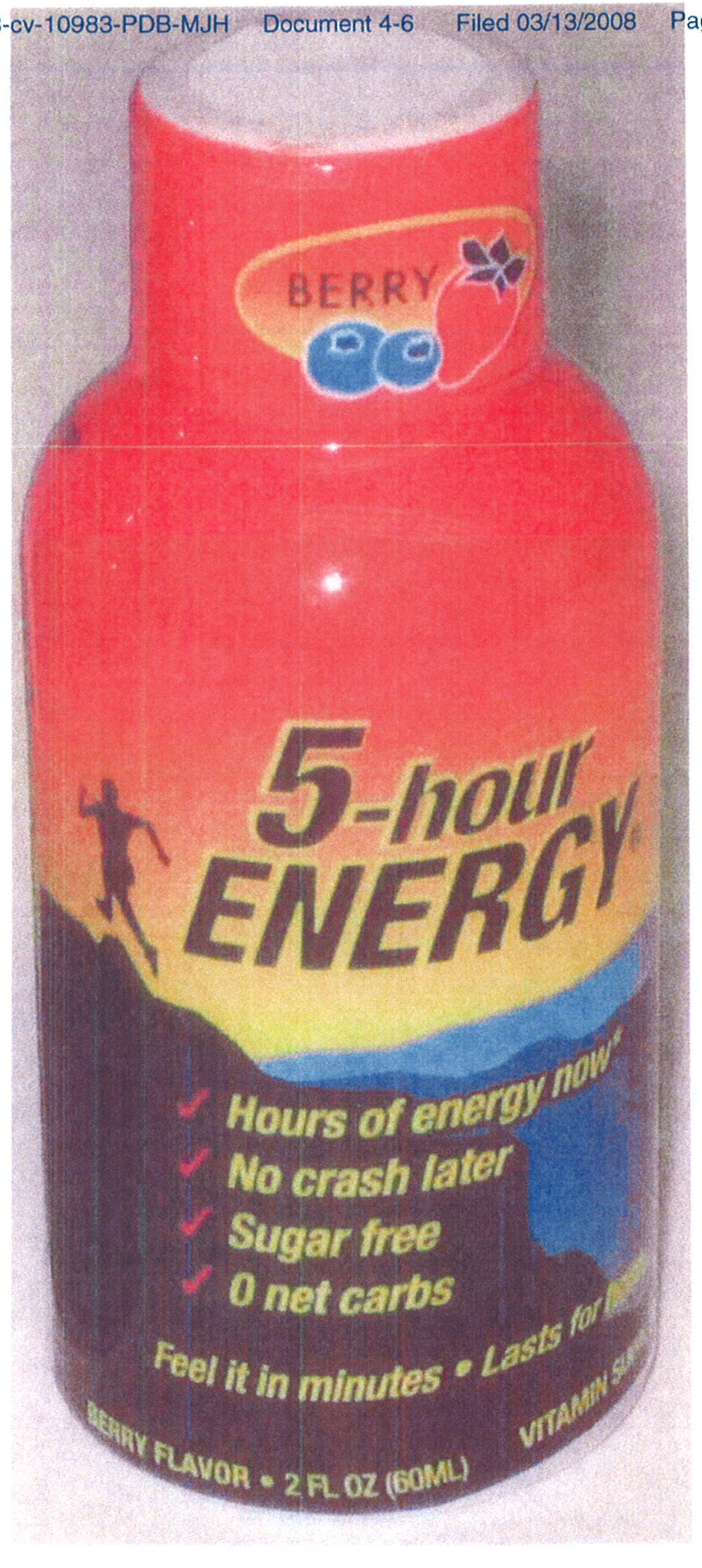

BERRY
5-hour
ENERGY®
Hours of energy now*
No crash later
Sugar free
0 net carbs
Feel it in minutes • Lasts for
BERRY FLAVOR • 2 FL OZ (60ML)
VITAMIN

EXHIBIT 1.35

EXHIBIT C

Hours of energy now.
No crash later.
2-oz. liquid means fewer pit stops
Crashing is something to avoid at all costs – in traffic – and from your energy drink. Crashing in traffic requires no explanation. The energy drink crash is that groggy, tired feeling that hits you after your energy drink wears off. Why do energy drinks make you crash? One minute you're wired up. The next you feel worse than before. It's the large amounts of sugar and caffeine. That's why you should switch to 5-Hour Energy™. With 5-Hour Energy you can leave grogginess behind and sail through your day without feeling tense, jittery, or crashing. That's because
5-Hour Energy contains a healthy, powerful blend of B-vitamins for energy, amino acids for focus and better mood, and enzymes to help you feel it fast. There's zero sugar, zero net carbs and only eight calories. It takes just seconds to drink and in minutes you're feeling awake, alert and productive. And that feeling lasts for hours. Plus, 5-Hour Energy is a great travel companion. It requires no refrigeration so you can drink it any time. Its small (only two ounces) so you can store it anywhere – cab, duffel or pocket. And it's the ideal way to hours of energy without having to drink a lot of liquid. So if your energy drink makes you crash, switch to 5-Hour Energy. Hours of energy now. No crash later.
5-hour ENERGY
Hours of energy now
No crash later
Sugar free
0 net carbs
Feel it in minutes • Lasts for hours
Pilot TRAVEL CENTERS
www.5hourenergy.com

EXHIBIT 1.37

IT'S ALL ABOUT FOCUS

Is the difference between peak performance and an "off day" physical or mental? Most athletes say it's in your head to get in the zone — no matter what you're doing — try 5-Hour Energy™. It contains a powerful blend of B-vitamins for energy, and amino acids for focus. The two-ounce shot takes seconds to drink, and in minutes you're feeling bright, alert and ready for action. And that feeling lasts for hours — without the crash or jitters.* That's because 5-Hour Energy contains zero sugar, zero herbal stimulants, as much caffeine as a cup of coffee — and only four little calories.

LIFE CAFE Walgreens CVS/pharmacy GNC

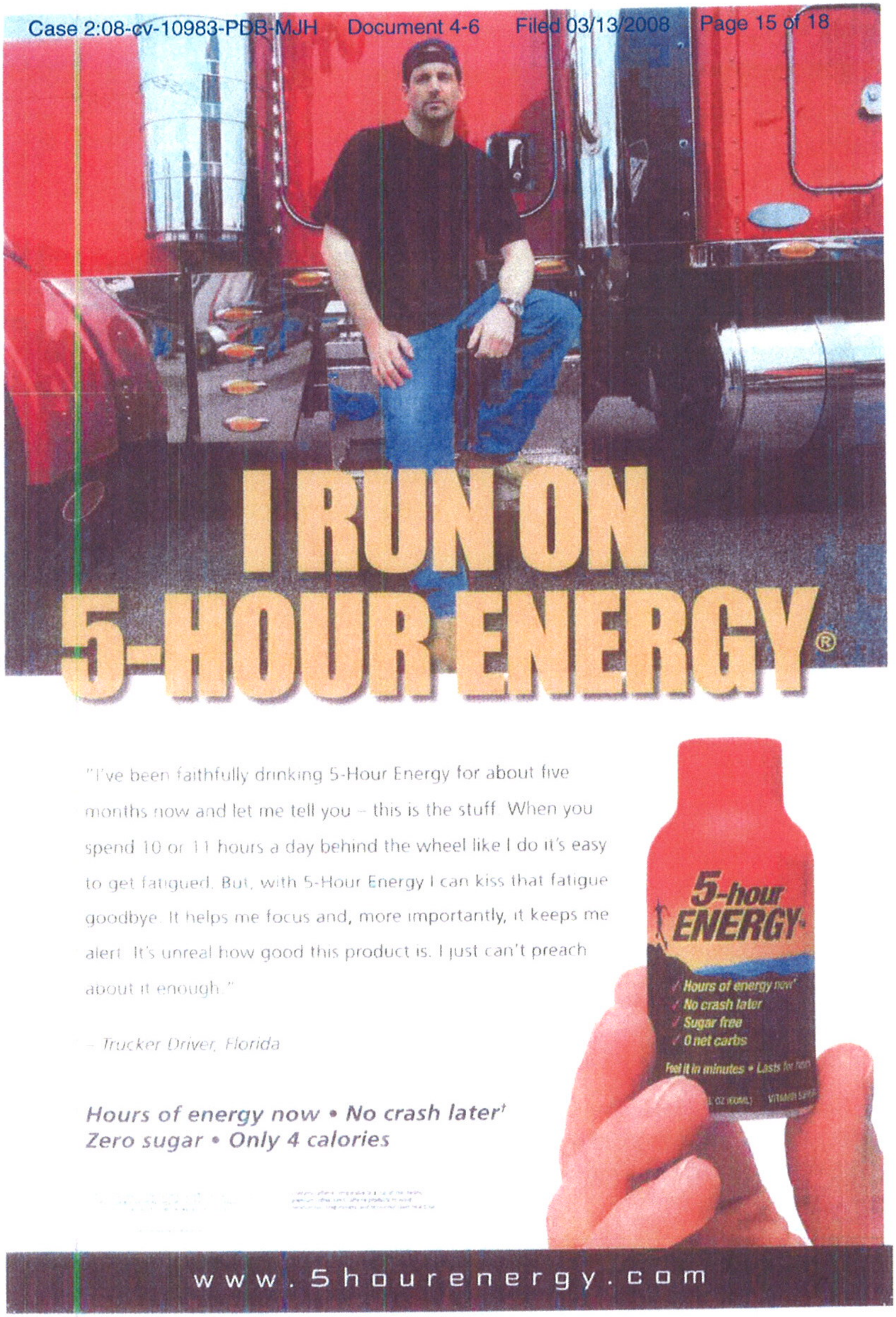
5-hour ENERGY

www.5hourenergy.com

EXHIBIT 1.38

The secret to
MORE FOCUSED
workouts
Does a great workout come from your body or your brain? Of course your body has to be there, but an alert, focused mind is what puts you in the zone. That's the idea behind 5-Hour Energy. Its blend of B-vitamins, amino acids and enzymes help you feel bright, alert and focused. What you won't feel is jittery, or crash. That's because 5-Hour Energy doesn't jack you up with sugar, caffeine and herbal stimulants.
To get anything out of those canned energy drinks you have to force down a lot of liquid up to 24 ounces. But it takes just seconds to slam down a two-ounce 5-Hour Energy shot, so its energizing ingredients get into your system faster. In minutes you can feel 5-Hour Energy brushing away the cobwebs and helping you capture the alert, focused feeling you need for a great workout or to just get through your day. And that feeling lasts for hours.
Hours of energy now. No crash later.
LIFE CAFE
Walgreens
GNC LiveWell
CVS/pharmacy
5-hour ENERGY
Hours of energy now
No crash later
Sugar free
0 net carbs
www.5hourenergy.com

EXHIBIT 1.39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I RUN ON
5-HOUR ENERGY®
"I've been faithfully drinking 5-Hour Energy for about five months now and let me tell you – this is the stuff. When you spend 10 or 11 hours a day behind the wheel like I do it's easy to get fatigued. But, with 5-Hour Energy I can kiss that fatigue goodbye. It helps me focus and, more importantly, it keeps me alert. It's unreal how good this product is. I just can't preach about it enough."
– Trucker Driver, Florida
Hours of energy now • No crash later†
Zero sugar • Only 4 calories
5-hour ENERGY
Hours of energy now
No crash later
Sugar free
0 net carbs
Feel it in minutes • Lasts for hours
www.5hourenergy.com

EXHIBIT 1.40

EXHIBIT D

SHOW SPECIAL
SHOW ORDERS ONLY: PRE-PAID
Booth # S-9528
Alpha Performance Labs
Las Vegas, NV
N2G Distributing
Highland, CA
1-800-250-2345
EXTREME MONSTER ENERGY SHOT
85¢
EACH
·BY THE PALLET
·CASE PRICE SIGHTLY HIGHER
Available Nationwide
75¢
EACH
·BY THE PALLET
·CASE PRICE SIGHTLY HIGHER
Available Nationwide
6 Hour ENERGY Shot
Fast Acting
Last 6-7 hours
No Crash
Zero Fat Calories
Nitro2Go INSTANT ENERGY
89¢
EACH
·BY THE PALLET
·CASE PRICE SIGHTLY HIGHER
Not Available in All Areas
1 Box = 12 Bottles
1 Case = 6 Boxs - 72 Bottles
1 Pallet = 108 Cases - 7,776 Bottles
Truck Load Pricing Available
Free Shipping Lower 48
Mixed Pallets OK
Alpha Performance Labs, Las Vegas, NV - N2G Distributing 8020 Palm Ave. Highland, CA 92346 - 1-800-250-2345

Document 1. Image 1 of 1

EXHIBIT 1.42

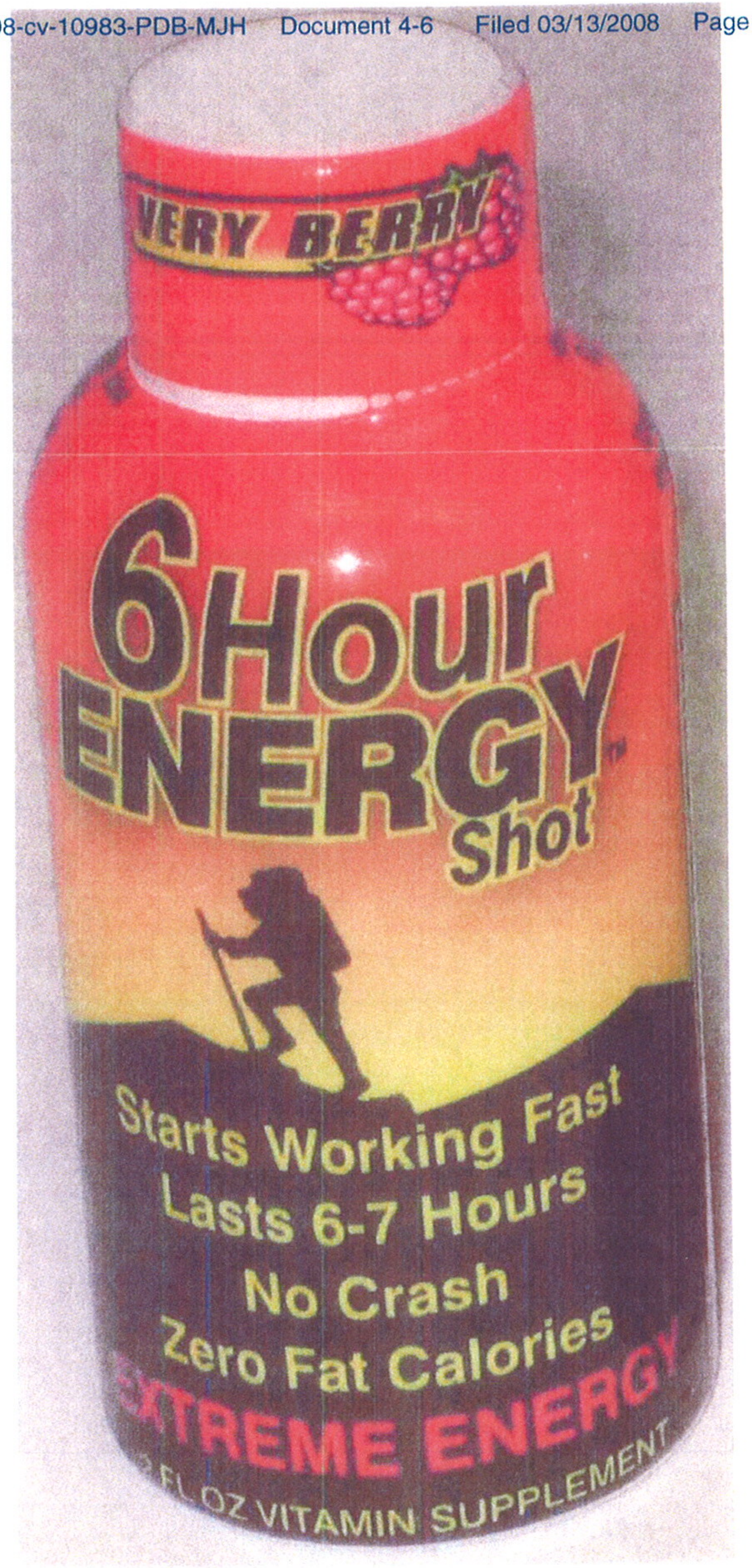

VERY BERRY
6 Hour ENERGY Shot
Starts Working Fast
Lasts 6-7 Hours
No Crash
Zero Fat Calories
XTREME ENERGY
FL OZ VITAMIN SUPPLEMENT

EXHIBIT 1.43

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

INNOVATION VENTURES, LLC
d/b/a LIVING ESSENTIALS,
a Michigan limited liability company,

Plaintiff,

vs

Hon. PAUL D. BORMAN

CIVIL ACTION NO. 2:08-CV-10983

N2G DISTRIBUTING, INC.,
a California corporation, and
ALPHA PERFORMANCE LABS,
a Nevada corporation

Defendants.

JURY TRIAL DEMANDED

MARK A. CANTOR (P32661)
MARC LORELLI (P63156)
BROOKS KUSHMAN P.C.
1000 Town Center
Twenty-Second Floor
Southfield, Michigan 48075
(248) 358-4400

Attorneys for Plaintiff

DECLARATION OF SCOTT HENDERSON

I, Scott Henderson, state as follows:

1. I am the President of Innovation Ventures, LLC d/b/a Living Essentials (hereinafter "Living Essentials") located at 46570 Humboldt Drive, Novi, Michigan 48377.

2. Living Essentials is a national marketer and distributor of nutritional and dietary supplements.

3. Living Essentials is the owner of the 5 HOUR ENERGY® Trademark used by Living Essentials since at least September 2004 as a trademark for use with the 5 HOUR ENERGY® supplement.

4. The 5 HOUR ENERGY® Trademark was duly and lawfully registered on September 27, 2005 and is currently registered at the United States Patent and Trademark Office as U.S. Registration No. 3,003,077 ("the '077 registration"). (Exhibit A.)

5. Living Essentials has used the 5 HOUR ENERGY® trademark of the '077 registration as its trademark continuously since September 2004 to the present in connection with its supplements, including in connection with promotion, marketing and advertising of supplements, for sale nationwide.

6. Living Essentials is the owner of the 5 HOUR ENERGY® Packaging Trade Dress used since at least September 2004 by Living Essentials as packaging for its 5 HOUR ENERGY® supplements, including in connection with promotion, marketing and advertising of supplements, for sale nationwide.

7. The 5 HOUR ENERGY® Packaging Trade Dress consists of the packaging illustrated in Exhibit B.

8. The 5 HOUR ENERGY® Packaging Trade Dress is arbitrary, non-functional, and distinctive. The terrain climber at sunrise bottle is not essential to the use or purpose of the supplement, but is an arbitrary and fanciful design that is used for source identification. The terrain climber at sunrise bottle also does not affect the cost or quality of the supplement. There are countless other bottle shapes and color designs that could have been employed by Living Essentials.

9. The 5 HOUR ENERGY® Trademark and Packaging Trade Dress has been extensively, continuously, and exclusively used by Living Essentials since September 2004 is inherently distinctive, and has become distinctive through the acquisition of "secondary meaning." Living Essentials has spent over $30,000,000 in advertising and marketing related to the 5 HOUR ENERGY® Trademark and Packaging Trade Dress. Living Essentials has used a nationwide network of distributors and has generated over $110,000 000 on its sales of the 5 HOUR ENERGY® product. The sales of the 5 HOUR ENERGY® supplement continue to

grow each quarter and have exceeded $22 million in the first two months of this year alone. The magnitude of these sales figures and promotion expenses illustrate the strength that the 5 HOUR ENERGY® Trademark and Packaging Trade Dress has in the marketplace. The 5 HOUR ENERGY® supplement is one of the most successful and recognized supplements in the marketplace.

10. As a result of such continuous use and extensive sales, advertising and promotion of the 5 HOUR ENERGY® Trademark and Packaging Trade Dress by Living Essentials, its authorized dealers and distributors, the marks and products associated with the 5 HOUR ENERGY® Trademark and Packaging Trade Dress are recognized by the public as emanating from Living Essentials.

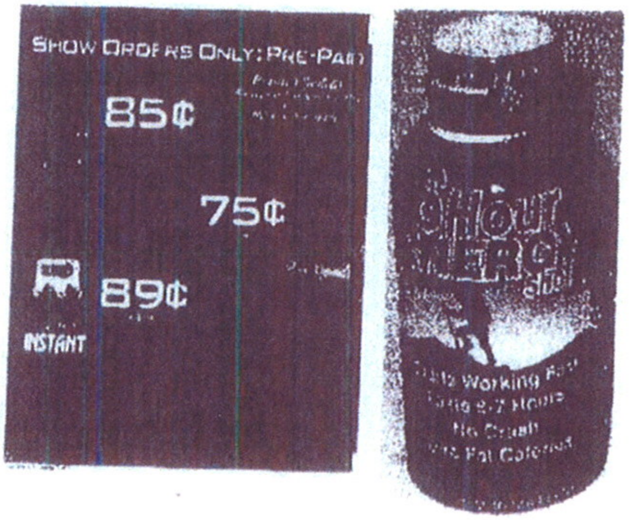
11. As noted above, Living Essentials advertises extensively with its 5 HOUR ENERGY® Trademark and Packaging Trade Dress. Samples of its advertisements are attached as Exhibit C.

12. The 5 HOUR ENERGY® Trademark and Packaging Trade Dress symbolizes the business goodwill of Living Essentials, and are intangible assets of substantial commercial value in connection with promotion, marketing and advertising of supplements for sale throughout the United States.

13. On information and belief, Defendant N2G Distributing, Inc. is a California corporation, having its principal place of business at 8020 Palm Avenue, Suite D, Highland, California 92346.

14. On information and belief, Defendant Alpha Performance Labs is a Nevada corporation, having its principal place of business at 5448 Painted Gorge Drive, Las Vegas, Nevada 89149.

15. Less than two weeks ago, Living Essentials came to learn that the Defendants were advertising a product that was a copy of its 5 HOUR ENERGY® supplement. Defendants presented their product at a trade show in Nevada that included many of Living Essentials' distributors and customers. At the trade show, Defendants were distributing samples and taking orders for supplements that included an imitation copy of the 5 HOUR ENERGY® Trademark and Packaging Trade Dress. Defendants' advertising of their "6 Hour Energy Shot" touted that it was available nationwide and wholesale pricing was provided. The following advertisement and sample product illustrates Defendants' offering which is also included as Exhibit D.



16. As demonstrated by Defendants' presence and activity at the Nevada trade show, the marketing channels of the Defendants for its supplements are the same as Living Essentials' marketing channels for its supplements. The 5 HOUR ENERGY® supplement is sold to consumers with an MSRP of $2.99 and consumers typically demonstrate a degree of care commensurate with that price point. Defendants' advertised price was set roughly 35-45% below typical wholesale prices of the 5 HOUR ENERGY® supplement. Defendants' supplements are directly competitive with Living Essentials' supplements.

17. Defendants have no consent, license, approval or other authorization to use the 5 HOUR ENERGY® Trademark and Packaging Trade Dress in connection with their products.

18. Based on the success of Living Essentials and a review of the products themselves, it is clear that the Defendants copied Living Essentials' 5 HOUR ENERGY® Trademark and Packaging Trade Dress. Defendants also copied Living Essentials' "caution" verbatim which further shows the intentional copying by the Defendants.

19. Defendants' advertising and sale of products of unknown quality that include imitations of the 5 HOUR ENERGY® Trademark and Packaging Trade Dress damages the reputation of Living Essentials and has stripped Living Essentials of the ability to control which products its reputation and good will are being used to promote or endorse.

I declare under penalty of perjury that the foregoing is true and correct.

Scott Henderson, President

Dated: 3/3/08

Mark: 5-HOUR ENERGY

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicant: Innovation Ventures, LLC

Mark: **5-HOUR ENERGY**

Class: 5 and 32

Atty. Docket No.: LIV0118TUS

DECLARATION OF ACQUIRED DISTINCTIVENESS UNDER § 2(f) OF THE TRADEMARK ACT

I, Scott Henderson, being hereby warned that willful false statements and the like so made are punishable by fine or imprisonment, or both, under § 1001, Title 18 of the United States Code, and that such willful false statements may jeopardize the validity of the application resulting therefrom, declare that all statements made herein of my own knowledge are true and that all statements made herein on information and belief are believed to be true, and further declare that I am the President of the Applicant, Innovation Ventures, LLC ("Innovation Ventures"), and am authorized to make the following declaration:

We at Innovation Ventures believe that the trademark 5-HOUR ENERGY has become distinctive, as applied to our company's products, as a result of Innovation Ventures' substantial investment in and use of the mark in connection with its products. The nature and extent of Innovation Ventures' use of the 5-HOUR ENERGY trademark in commerce is as follows:

Atty. Docket No.: LIV0118TUS

1. Innovation Ventures has used the mark 5-HOUR ENERGY since at least as early as September 2004 in connection with a 2-ounce product that is both a dietary supplement and an energy supplement in liquid form. As a result of Innovation Ventures' extensive use, advertising, volume of sales, and breadth of distribution under the mark 5-HOUR ENERGY, the relevant public has come to associate 5-HOUR ENERGY with Applicant.

2. As of June 2008, our company has sold over 125 million bottles of dietary supplements/energy supplements in liquid form under the 5-HOUR ENERGY trademark. The number of units sold can be broken down approximately as follows:

2008 (January-June): 54.4 million bottles

2007: 58.2 million bottles

2006: 10.8 million bottles

2005: 2.0 million bottles

2004 (June-December): 0.2 million bottles

As the above figures indicate, there has been exponential growth for the 5-HOUR ENERGY brand since the date of first use, and the substantial sales figures establish that the mark is recognized in the marketplace.

3. Innovation Ventures owns a website at the domain name www.5hourenergy.com, which has been in use since at least as early as October 2005. The website makes prominent use of the 5-HOUR ENERGY trademark.

4. To date, Innovation Ventures has spent over $40 million dollars on advertising and promoting the 5-HOUR ENERGY product. In addition to the website, the 5-HOUR ENERGY mark has been promoted on point-of-sale displays, television and radio advertising, print advertising, and through a number of prominent trade shows, including the National Association of Convenience Stores ("NACS"), which draws approximately 23,000 attendees and the National Association of Chain Drug Stores ("NACDS"), at which Innovation Ventures had a 20 foot x 30 foot booth. Photos of the Innovation Ventures booth with prominent signage featuring the 5-HOUR ENERGY mark at the 2007 NACS and the 2008 NACDS shows are attached. Representative samples of advertising materials are also attached.

5. The 5-HOUR ENERGY product is sold through over 100,000 retail outlets in the United States, including well-known bricks-and-mortar retailers like Walgreen's, CVS Pharmacy, Rite-Aid, 7 Eleven, Target, BP gas stations, Speedway gas stations, Safeway grocery stores, Walmart, Kroger, Dunham's Sports, Dick's Sporting Goods, The Home Depot, GNC and others. The product is also sold through numerous online retailers, including amazon.com and drugstore.com. Consumers are thus exposed to the product through a wide range of distribution outlets throughout the United States. Given the breadth of this distribution, it is extremely likely that consumers would be repeatedly exposed to the 5-HOUR ENERGY brand.

6. I am not aware of any other company producing 5-HOUR ENERGY products.

Atty. Docket No: LIV0118TUS

Upon information and belief, we at Innovation Ventures believe we have established substantial goodwill in the 5-HOUR ENERGY trademark and that the public firmly associates this mark with our products.

I declare under penalty of perjury under the laws of the United States, the foregoing is true and correct.

Executed this 15 day of July, 2008, at Novi, Michigan, USA.

SCOTT HENDERSON, PRESIDENT
INNOVATION VENTURES, LLC

EXHIBIT 3.04

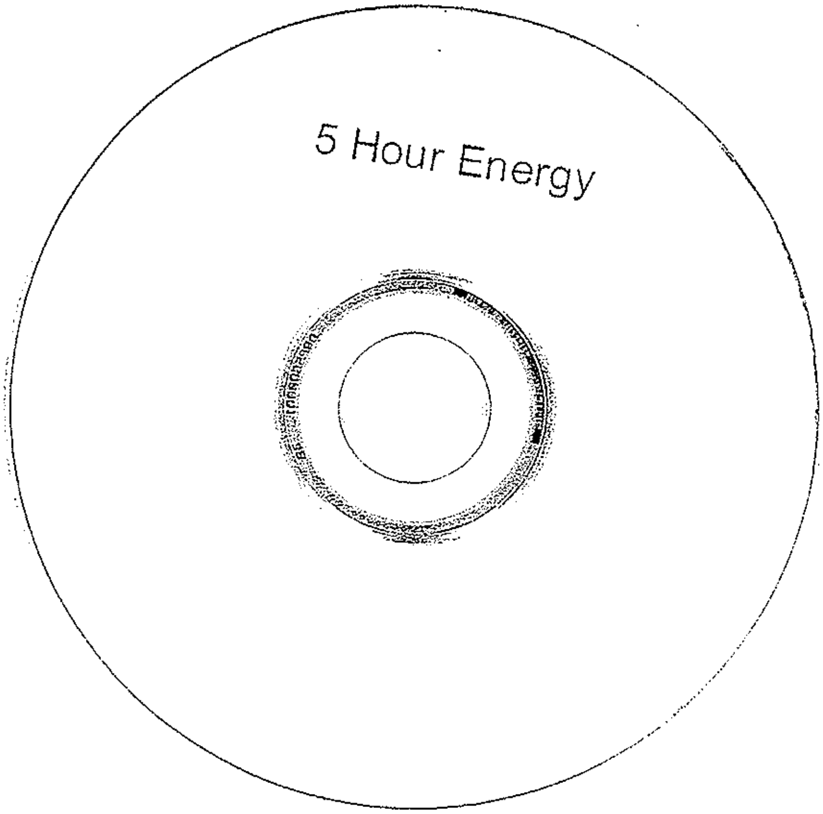

5 Hour Energy

EXHIBIT 4.01

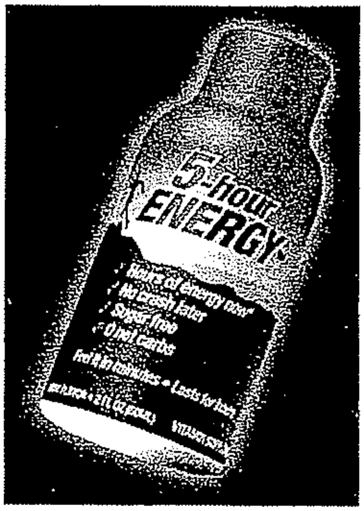

5-hour
ENERGY
No crash later

EXHIBIT 5.01